No. 76-6501

IN THE

Supreme Court of the United States

October Term, 1976

STATE OF NEW MEXICO,
R. LEE AAMODT, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
PUEBLO DE SAN ILDEFONSO,
PUEBLO DE POJOAQUE,
PUEBLO DE NAMBE,
PUEBLO DE TESUQUE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I. INTRODUCTION

Pursuant to Rule 23 of the Rules of this Honorable Court Petitioners, the State of New Mexico and several hundred private landowner Defendants in the Court below, hereby petition this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause on June 28, 1976.

II. OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 537 F.2d 1102 (1976) and is attached hereto as Appendix A. The District Court for the District of New Mexico did not write a formal opinion but did enter an interlocutory order on December 2, 1974 limiting the water rights of the Respondent Pueblos in accordance with the doctrine of prior appropriation to beneficial use. The District Court also entered an order on December 6, 1974 striking the separate complaint in intervention of the Respondent Pueblos and denying reconsideration of the Court's ruling that the private counsel for the Respondent Pueblos may not separately represent the Respondent Pueblos independently of the United States Department of Justice, which also continued to represent the Pueblos. These orders are attached hereto as Appendix B and C.

III. GROUNDS ON WHICH JURISDICTION IS INVOKED.

The judgment of the Court of Appeals was entered on June 28, 1976 in both Cause Nos. 75-1069 and 75-1106 which were consolidated for argument and decision. A timely petition for rehearing *en banc* was filed by the Petitioners which petition was denied August 11, 1976. This petition for a Writ of Certiorari was filed within 90 days of August 11, 1976 as required by law. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

IV. QUESTIONS PRESENTED.

(a) Whether the Court of Appeals erred in overruling the discretionary determination of the District Court that the Respondent Pueblos may not be separately represented by private counsel independent of Respondent Pueblos' representation by the United States Department of Justice (No. 75-1069).

(b) Whether the Court of Appeals erred in deciding the issue of priority between the Respondent Pueblos and the private landowner Petitioners when the question was not argued in or decided by the District Court (No. 75-1106).

(c) Whether the Court of Appeals erred in its construction of the relevant Acts of Congress thereby refusing expressly to limit and define the Respondent Pueblos' water rights in accordance with the doctrine of prior appropriation. (No. 75-1106).

V. STATUTORY PROVISIONS INVOLVED.

The Acts of Congress involved in this appeal are as follows:

(a) Act of June 7, 1924 (43 Stat. 636), commonly known as the Pueblo Lands Act. The language of the Act pertinent to this Appeal is found in section 6, viz:

> It shall be the further duty of the board to separately report in respect to each such pueblo
>
> (a) The area and character of any tract or tracts of land within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico and the extent, source, and character of any water right appurtenant thereto in possession of non-Indian claimants at the time of filing such report, which are not claimed for said Indians by any report of the board.
>
> (b) Whether or not such tract or tracts of land or such water rights could be or could have been at any time recovered by said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians . . .
>
> (c) The fair market value of said water rights and of said tract or tracts of land (exclusive of any improvements made therein or placed thereon by non-Indian claimants) whenever the board shall determine that such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians, and the amount of loss, if any, suffered by said Indians through failure of the United States seasonably to prosecute any such right.
>
> The United States shall be liable, and the board shall award compensation, to the Pueblo within the exterior boundaries of whose lands such tract or tracts of land shall

> be situated or to which such water rights shall have been appurtenant to the extent of any loss suffered by said Indians through failure of the United States seasonably to prosecute any right to the United States or of said Indians. . . .

The complete text of the Act is set forth in Appendix D.

(b) Act of March 13, 1928 (45 Stat. 312) commonly known as the Middle Rio Grande Conservancy District Act. The relevant language of the 1928 Act is as follows:

> Provided further, That all present water rights now appurtenant to the approximately eight thousand three hundred and sixty-four acres of irrigated Pueblo lands owned individually or as pueblos under the proposed plan of the district, and all water for the domestic purpose of the Indians and for their stock shall be prior and paramount to any rights of the district or of any property holder therein, which priority so defined shall be recognized and protected in the agreement between the Secretary of the Interior and the said Middle Rio Grande Conservancy District, and the water rights for the newly reclaimed lands shall be recognized as equal to those of like district lands and be protected from discrimination in division and use of water . . . .

The complete text of the Act is set forth in Appendix E.

(c) The Act of May 31, 1933 (48 Stat. 111). The language of the Act which is pertinent to this appeal is found in section 9:

> Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water, and irrigation purposes for lands remaining in Indian ownership, and such water rights shall not be subject to loss by non use or abandonment thereof as long as title to said lands shall remain in the Indians.

The complete text of the 1933 Act is set forth in Appendix F.

VI. STATEMENT OF THE CASE.

These appeals arise out of a water rights adjudication suit in the District Court for the District of New Mexico, pursuant to 28 U.S.C. 1331 and 1345, and 43 U.S.C. 666, to determine the water rights of the Respondent Pueblos, the Respondent United States, and the Petitioner private landowners in the Rio Nambe-Pojoaque Stream System. The action originally filed by the Petitioner State of New Mexico in April 1966 named as Defendants the private landowner Petitioners, the Pueblo Respondents and the Respondent United States. On the motion of the United States, the District Court realigned the Respondent United States and the Respondent Pueblos as Plaintiffs in intervention. This order was entered February 17, 1967. Thereafter, Respondent United States and the Respondent Pueblos filed their complaint in intervention, which was served on all the Petitioners in this cause. The Respondent United States and the Respondent Pueblos have been at all times represented by the Department of Justice on the complaint in intervention.

After lengthy discovery by both the Respondents and the Petitioners, a pre-trial order, governing all further proceedings on the Respondents' (U.S./Pueblos') complaint in intervention, was filed in January, 1969.[1] The Petitioners thereafter moved for partial summary judgment, which motion was denied by the Special Master and the District Court in 1973. At the fourth pre-trial conference in October 1973, before the Special Master, the parties agreed that the trial on the merits of the claims of the Respondent Pueblo Indians would commence, and a trial date of April 16, 1974 was later set. The claims of the United States for the National Forest were not involved in this

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1. The District Court later expressly ruled that the January, 1969 pre-trial order had been duly entered and was effective from that time; this decision was not appealed from.

first trial.[2] Approximately 2-1/2 weeks before trial was to begin, private counsel for the Respondents, who are paid from government funds under a special contract between the Bureau of Indian Affairs and the Respondent Pueblos, entered an appearance as additional counsel for the Pueblos and moved for a six-month continuance. The U. S. Department of Justice had, prior to the entry of appearance of the private counsel, exclusively represented the Pueblos from 1967 until March, 1974. The Justice Department counsel have not withdrawn at any time, nor have the Pueblos ever moved to disqualify the Federal counsel from the case.[3] At the hearing before the Special Master on the motion for a continuance, the United States neither concurred in nor resisted the motion and at one point reaffirmed that the United States was ready for trial on April 16, 1974. The trial on the Pueblos' water rights did in fact begin on April 16, 1974. Despite strenuous objections from counsel for the Petitioners, the private counsel and the United States Department of Justice counsel immediately demanded and received permission from the Special Master to conduct separate direct and cross-examinations of witnesses, although both groups were representing the same Pueblos on the same complaint in intervention. After four weeks of trial the private counsel and the Government counsel moved to set aside the pre-trial order of January, 1969 in order to call several new expert witnesses not mentioned in the 1969 pre-trial order and

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2. The United States' claims for reserved rights for the Santa Fe National Forest assert priorities no earlier than the dates of reservation of forest lands; as these dates are all later than 1890, and all United States claims for the Pueblos assert an aboriginal, or pre-1598, priority for the Pueblos, it is obvious that the United States' forest rights are acknowledged by the United States to be necessarily junior in time, and thus legally inferior, to any and all rights of the Pueblos.

3. However, in pleadings filed after the District Court's September 15, 1974 letter, new Pueblo counsel accused old Pueblo counsel (i.e., U.S. Department of Justice) of "conflict of interest;" these allegations, repeated in the Circuit Court, but never admitted by Department of Justice attorneys for the Pueblos, may have led the Circuit Court into confusion on this point.

to modify the statement of the issues for trial. The Special Master refused to "set aside" the pre-trial order but did modify it to allow the Respondents to call the new expert witnesses. The Petitioners thereupon took exception to the Special Master's ruling to the District Court. The District Court reversed the Special Master and held (1) no new witnesses, other than substitute witnesses, could be called by either side, and (2) the Respondents could not be separately represented by both the private counsel and the Government counsel but rather by only one combined team of counsel conducting one direct examination and one cross-examination. After the District Court ruled as stated above, but before the entry of a formal order, the private counsel, acting independently of Justice Department counsel for the Pueblos, filed, without leave of the Court, a new "complaint in intervention" for the same Pueblos that had been parties plaintiff since 1967. When the District Court entered a formal order on December 6, 1974 denying reconsideration of its ruling on the separate representation of the Pueblos, the Court also struck the new "complaint in intervention." The District Court's order of December 6, 1974, is the basis of Appeal 75-1069.

The appeal in No. 75-1106 was from the District Court's order of December 2, 1974 defining and limiting the Respondents' water rights according to their historical uses under the doctrine of prior appropriation to beneficial use.

Since filing of the U. S./Pueblos' complaint in intervention in February, 1967, the United States has asserted on behalf of the Pueblos, under a variety of alternative legal theories, that the Pueblos' water rights should be adjudicated to be of such a nature that the Respondents could expand their water uses beyond their vested historical uses in virtually any amount and for virtually any purpose.

After extensive pre-trial discovery, the Petitioners moved for partial summary judgment on the ground that the water rights of the Respondent Pueblos should be adjudicated as a matter of law in accordance with the doctrine of prior appropriation to beneficial use. The Special Master denied the motion for partial

summary judgment in January, 1973. This ruling was affirmed by the District Court in August, 1973. However, after the Petitioners sought review of certain procedural rulings of the Special Master during the trial, the District Court announced, by letter of August 28, 1974, that its original ruling on the motion for partial summary judgment had been misinterpreted by the Special Master. The Court thereupon ruled that the water rights of the Pueblos, as well as the water rights of the Petitioners, were to be adjudicated in accordance with the doctrine of prior appropriation to beneficial use. The District Court's interlocutory order of December 2, 1974 (Appendix C) expressly decreed that the Pueblos' water rights were governed and limited by the doctrine of prior appropriation. This order was certified by the District Court as a controlling question of law under 28 U.S.C. 1292(b), thereby allowing an interlocutory appeal to the Court of Appeals.

VII. REASONS FOR GRANTING THE WRIT.

a. Appeal No. 75-1106

The questions arising from the Court of Appeals' decision in Appeal No. 75-1106 are of first impression and have never been finally adjudicated in any court of the United States. In fact Cause No. 6639, District Court for the District of New Mexico, was the first case in the United States where the Department of Justice had expressly cooperated in securing an adjudication of the water rights of the Pueblo Indians.

The issues involved are fundamental and the possible results potentially far-reaching. The Petitioners contended in both the District Court and the Court of Appeals that the Congress of the United States, pursuant to its plenary jurisdiction under Art. I, section 8 of the United States Constitution, has expressly legislated, by the Acts of Congress heretofore set forth in this petition, that the Respondents' water rights are governed and limited by the doctrine of prior appropriation. In addition, the Congress flatly rejected, at the request of the Pueblo Indians themselves, the contention that their water rights are legally

similar to the water rights of reservation Indians and are thereby to be determined under the doctrine of *Winters v. United States*, 207 U.S. 564 (1908). Further, the Petitioners argued that under the laws of the antecedent sovereigns, the Kingdom of Spain and the Republic of Mexico, the Pueblo Indians' water rights were limited by their historical uses in existence at the time of the Spanish conquest, and that any use made by them, in excess of their uses at the time they became subjects of the Spanish Crown, were in common with and no greater than the rights enjoyed by all the inhabitants of the territory which is now the State of New Mexico. Finally, Petitioners argue that the Congress expressly recognized that the water rights lost by the Pueblo Indians through the actions of the Pueblo Lands Board confirming the fee titles of non-Indian settlers on Pueblo Indian lands were appurtenant to the lands confirmed to the settlers, and therefore compensation should be awarded on the basis that the Pueblo Indians had permanently lost a valuable property right. The Pueblo Lands Board, over the vigorous protests of the Pueblo Indians, had disallowed all but nominal compensation to the Pueblo Indians for the loss of appurtenant water rights on the theory that the Indians had retained "Winters Doctrine" or reserved water rights superior and paramount to the water rights of all other landowners on the lands formerly owned by the Pueblos. It was this determination which was set aside by the Congress when the actual compensation was appropriated in the Act of May 31, 1933. In addition, the Congress in 1928 authorized a contract between the Middle Rio Grande Conservancy District and the Department of the Interior which recognized a first priority in certain Pueblo Indian Tribes for water to irrigate the lands historically used by the Pueblo Indians but provided that water would be shared on an equal priority on all "new lands" irrigated both by the Pueblo Indians and the non-Indians in the Conservancy District. The Congress has never attempted to legislate the relative priorities of the Indians and non-Indians to the waters of the Nambe-Pojoaque stream system and the legislative history indicates that section 9 of the Act of May 31, 1933 was added to reserve this issue for a later judicial determination and to ensure that nothing in the

1933 Act would expose the Pueblo Indians to loss of any vested rights to water.

Prior to 1913, this Court had held that the Pueblo Indians were not entitled to the same Federal protections respecting the alienation of their lands as other Indians. (cf. *U. S. vs. Joseph,* 94 U. S. 614, (1876). However, in 1913, this Court held in the *Sandoval* case, *U. S. vs. Sandoval,* 231 U. S. 28 (1913), that the Pueblo Indians were under the protection of the United States and subject to the restrictions of Federal law concerning the alienation of their lands. The result of this decision was instantly to cloud the titles to real estate acquired by non-Indians from the Pueblo Indians between 1848 and the date of the *Sandoval* decision. Immediate political pressure was brought to bear on Congress to provide a remedy for these hapless non-Indian landowners who held deeds from Pueblo Indians. Most of these lands were irrigated lands with appurtenant water rights.

The Congress, by the Act of June 7, 1924 (43 Stat. 636-Appendix "D" to the petition) set up the Pueblo Lands Board to adjudicate titles to all lands in dispute between the Pueblos and the thousands of non-Indian claimants. The Act expressly directed that if the Board ruled in favor of a non-Indian in any of these disputes, the Board should also determine the amount of compensation to which the Pueblos would be entitled for the loss of the real estate *and its appurtenant water rights.* The effect of the Board's decisions in favor of non-Indian claimants was to confirm the titles to lands and appurtenant water rights of the predecessors in interest to hundreds of the private landowner Petitioners in this case, and correspondingly to extinguish the titles of the Pueblos to these lands and water rights. The decisions of the Pueblo Lands Board were subsequently confirmed by quiet title decrees of the United States District Court for the District of New Mexico in actions filed by the United States on behalf of the Pueblos.

After receiving the reports of the Pueblo Lands Board, and having received complaints from the Pueblos alleging inadequate money awards for their lost lands, a U. S. Senate Indian

Affairs Subcommittee undertook extensive investigatory hearings on whether or not the Pueblo Lands Board had correctly determined the amount of compensation for the Pueblos' loss of lands and appurtenant water rights; these hearings were held in connection with a pending Senate Bill to appropriate funds to the Pueblos for these losses.[4] The Pueblo Lands Board had almost always limited its award of compensation for irrigated lands on the theory that the water rights retained by the Pueblo Indians on their remaining lands were superior and paramount to the water rights of all other landowners on lands formerly owned by the Pueblo Indians. All representatives of the Pueblos, including their private counsel, strongly urged the Congress to repudiate any notion that compensation for the Pueblos' water rights should be reduced because, as the Board had decided, the Pueblos had retained "Winters Doctrine" water rights, and thus were not entitled to full compensation for the "appropriative" water rights they had lost. The Pueblos' representatives urged that the compensation set by the Board was too low since the Pueblos had in fact forever lost valuable appurtenant water rights under the doctrine of prior appropriation. The Congress decided the Board was wrong in concluding that the Pueblos retained "Winters Doctrine" water rights on their remaining lands. Senator Bratton of New Mexico expressed the general attitude of the Congress that the Board had adopted an erroneous legal theory in awarding compensation to the Pueblos. During the debate on the proposed legislation to appropriate compensation for the Pueblos, Senator Bratton, sponsor of the pending bill, stated:

> SENATOR BRATTON. In connection with what Mr. Ely has just said, let me observe that I do not understand that the purpose of this bill is to compensate the Indians for water rights lost as separate and distinct from the land. I do not understand that the question of priority of water rights is involved except as those rights relate to the land

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4. Hearings on Pueblo Indian water rights before a Subcommittee of the Committee on Indian Affairs, U. S. Senate, 71st Congress, 2d Session, Pt. 20, "Survey of the Condition of the Indians in the U. S." (1931).

to which the water was appurtenant. In fact, I was surprised yesterday to hear it asserted that the board had not adjudicated water rights in connection with the land lost by Indians through negligence of the Government. I do not share the view that these Indians have any prior or superior right to all the water within the watershed, nor that the white settlers have any inferior or secondary right to the water within the watershed. The Indian owns his land with the water right appurtenant thereto and resulting from the adjudication of the board, followed by decrees of the United States Court, the white man owns his land with all the water appurtenant thereto. There is no difference in priority or inferiority as between Indians on the one hand and whites on the other; no more so than there is among whites separate and distinct or Indians separate and distinct. I do not understand that Senator Cutting and I who sponsor the bill take the position that the Indians have a superior right to all the water or that the whites have a superior right to all the water. Water rights in this situation go with the land to which they are appurtenant the same as they do in any of the other Western States where the doctrine of prior appropriation applies, and that doctrine is in force in New Mexico. Considering the act and decrees of court it is my belief that the Indians are governed by that doctrine the same as whites. ("Survey of the Condition of the Indians in the U. S.," Pt. 20, pp. 11208-9).

Mr. John Collier, appearing on behalf of the Pueblos themselves, agreed entirely with Senator Bratton's position, as shown by this colloquy found on page 11254 et seq.:

> SENATOR BRATTON. Let me ask you a question. Suppose that watershed supplied only enough water to irrigate a thousand acres; and there was no more water. The Pueblo Lands Board took from the Indians 500 acres of irrigated land, leaving to the Indians 500 acres of irrigable and 500 acres of irrigated land. Later on the Indians are ready to irrigate those 500 irrigable acres. That watershed has only enough water to irrigate a thousand acres. Under the doctrine announced by Governor Hagerman the Indians would have the right to demand the water appurtenant

to the 500 acres of irrigated land lost to the settlers and apply it to the 500 acres of irrigable land which they retained and were now ready to irrigate?

MR. COLLIER. They could take that water or any other water, under that theory.

* * *

The doctrine in question asserts that the Indian endowment of water on irrigable land is complete, unextinguishable, virtually eternal. Assuming that the Government were able to go into Court and cause that doctrine to prevail – assume it, if you please – what follows? It follows not simply that the white owners of water at that moment would have to surrender water to be transferred to Pueblo-owned lands, but that every water right in the watershed would be clouded for all time, because it is not just a matter of using water on all of the irrigable acreage left to the Pueblos; it is a matter of beneficially using it, and there are types of crops which use enormously more water than other types of crop. The Indians might like to go in and develop cranberry bogs; they could appropriate the water on that land and by this doctrine they are entitled to go out and get it. They might go in for some kind of melon that drinks up water in enormous quantities.

SENATOR BRATTON. I agree with your theory. Under the doctrine announced by Governor Hagerman [Chairman of the Pueblo Lands Board], if the Indians elected to bring in 5,000 acres of raw land, and it required all the water from 5,000 acres of land under intensified production, whether it be alfalfa, orchards, or what not, they could take away that water from every settler and kill the orchards, kill the alfalfa, reduce the land to waste, by diverting the water to the raw land which the Indians are now ready to bring under cultivation, which is absurd.

MR. COLLIER. That is what the doctrine means, if it means anything at all. Now, one minute more.

SENATOR CUTTING. Would it not eternally cast a cloud over every land value down there?

> MR. COLLIER. Of course, because a clouded water title is a clouded land title in New Mexico. And it would provide the means of an everlasting state of embroilment between the white neighbors and the Indians . . . (Survey of the Condition of the Indians in the U. S., pt.20, *supra*).

Both the Senate and House Committee reports on the pending bill justified increasing the Lands Board's awards because the Pueblos had lost valuable water rights. In the House Indian Affairs Committee Report, authored by Representative Chavez of New Mexico, it was recommended that a section 9 be added to preserve for later judicial decision the question of relative priority between Indians and non-Indians. The Report explains committee amendment No. 3, (Sec. 9 of the bill), as follows:

> Objection having arisen in the consideration of this bill before your committee as to the question of priority of water rights as between Indians and non-Indians, the committee has deemed it advisable to offer committee amendment No. 3. *The question of priority of water rights will necessarily be one for judicial determination, and this amendment is designed and intended to leave the matter to the courts for future action.* (Report No. 1061, House of Representatives, 72nd Congress, 1st session, page 6). [Emphasis added.]

The three Acts of Congress, i.e., the 1924 and 1933 Acts and the intervening 1928 Act, leave no doubt that Congress treated the water rights of the Pueblos as being under the doctrine of prior appropriation, except for loss by forfeiture or abandonment, which was expressly prevented by section 9, at least for water rights not used after May 31, 1933. It is plain that section 9 itself was added to the Act of May 31, 1933, as a "savings clause," in order to protect the Pueblos' claim of a prehistoric priority for their remaining water rights, i.e., those appurtenant to their remaining irrigated lands. The prehistoric water right priority of the Pueblos has never been disputed by the Petitioners. There is a question below whether those Petitioners whose titles derive from the Pueblos share the priority of the Pueblos' remaining rights since such rights of Petitioners deraign

from Pueblo ownership to Petitioners through decisions of the Pueblo Lands Board. The District Court has never passed on this question.

The Court of Appeals has now turned these Acts of Congress upside down and treated section 9 of the 1933 Act as a "Congressional mandate" that denies recognition of the Pueblos' appropriative water rights, which the Pueblos themselves expressly claimed forty years earlier. The Court's opinion is not only inconsistent with these Acts of Congress, but fails to take into account the fact that the "Winters Doctrine" is court-made law for reservation Indians whose water rights Congress had failed to define. However, the Congress has, on the basis of the unique legal history of the Pueblos, specially legislated three times on Pueblo Indian water rights, and has always defined those rights in terms of the doctrine of prior appropriation that obtained in New Mexico under Spanish, Mexican and United States law.[5] The legislative history relied on by the Court of Appeals in construing section 9 of the 1933 Act, specifically the statements of Congressman Leavitt of Montana, actually support Petitioners' contention that section 9 was intended solely to preserve the question of relative priority between Indians and non-Indians for later judicial resolution. Respondents have changed their legal

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5. The Court of Appeals has confused Congressional references to the relative priority of remaining Pueblo water rights with the issue of the doctrine of law governing those rights; the Congress clearly understood it was essential to compensate the Pueblos for valuable appropriative water rights they had lost without prejudicing the Pueblos' right to claim in a future adjudication suit that their remaining appropriative rights were senior in time, and thus legally superior, to those of their non-Indian neighbors. Respondents have taken out of context Congressional references to this entirely distinct issue of relative priority of appropriative rights and persuaded the Court of Appeals that they refer to the question of the doctrine of law defining Pueblo rights, i.e., whether they are limited to historical beneficial use under prior appropriation.

position of 40 years earlier, and now claim that section 9 somehow exalted Pueblo Indian water rights over their non-Indian neighbors' water rights, thereby placing in jeopardy the stability of water use arrangements between Indians and non-Indians which have existed for centuries. All Committee Reports of House and Senate Committees considering the bills that became the Act of May 31, 1933, expressly recite that the Pueblo Lands Board had relied on an "erroneous theory", i.e., that the Pueblo retained paramount "Winters Doctrine" reserved water rights, in reducing compensation to the Pueblos for lost lands with appurtenant water rights. Despite this clear and decisive legislative history, the Circuit Court has now resurrected the "erroneous theory" of the Lands Board and reversed the clear verdict of the Congress.

The Court of Appeals thus erred in its construction of section 9 of the Act of May 31, 1933 in two important respects: (1) the Court seems to say (although it does not expressly decide) that section 9 is an affirmative grant by the Congress to the Pueblo Indians of a water right which is in some undefined way different than the water rights of all other water users in the stream system. The Court's opinion does not say what this right is, except that it is not governed by New Mexico State law. The District Court is directed to receive additional evidence on the laws of Spain and Mexico which may be "pertinent," although it is clear from the District Court's order of December 2, 1974 that this same evidence was fully considered by the District Court.[6] (2) The Court of Appeals, apparently on its own initiative, construed section 9 as a "Congressional mandate"

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6. It should be noted that the District Court did not enter its ruling in 75-1106 without due consideration of the complex legal and factual issues involved; before December 2, 1974, the District Court had before it the affidavits of expert witnesses on the laws of Spain and Mexico, on the prehistory and Spanish Colonial administrative history of the Pueblos and on the archaeological record of their irrigation practices, as well as extensive and numerous legal memoranda of counsel for all concerned parties on all the alternative legal theories and claims of the United States and the Pueblos. These materials had been submitted to the District Court in connection with the earlier motion for partial summary judgment.

that the water rights of non-Indians can never, under any circumstance, be superior to *or even on a par with* the water rights of the Respondents. The District Court never decided this extremely important issue, although it is rasied by the pleadings, particularly the pleadings of the private landowner Petitioners. In this respect, the Court of Appeals erroneously converted the simple savings clause language of section 9 of the Act of May 31, 1933 into a Congressional fiat depriving the private landowners of a crucial element of their water rights without any argument or briefs presented to the District Court or the Court of Appeals on the issue.

One final but important point should be made about the Court of Appeals' opinion. The Court starts out by stating that the principal issue on appeal was ". . . . whether water uses by Pueblo Indians in New Mexico are controlled by state law based upon prior appropriation." Thus, the Court failed from the outset to distinguish between a case involving an attempt by the State to exercise jurisdiction over Pueblo water uses and a case seeking to define the nature of Pueblo water rights. The case at bar has never, directly or indirectly, involved claims that Pueblo Indian water rights derive from the Constitution and laws of the State of New Mexico, or that the State's water code, requiring compliance with an administrative procedure to appropriate or transfer water rights, applies to Indian water uses on Indian land. The action is, on the contrary, purely one to determine the nature, extent and priority of all rights of all claimants to waters of the Rio Nambe, under all applicable law. The District Court held that Pueblo rights were, like those of their neighbors, limited by the doctrine of prior appropriation.[7]

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7. While prior appropriation is also the law of the State of New Mexico, it was never argued or decided below that Pueblo Indian rights were limited to historical uses by the force of the Constitution and laws of the State; rather, it was argued and decided in the trial court that the laws of Spain and Mexico, and the Acts of the U. S. Congress, had limited Pueblo Indian water rights to their largest historical beneficial use, with an aboriginal, i.e., pre-Columbian, priority.

The Court of Appeals has thus, in 75-1106, fundamentally misconceived the nature of the case itself; misconstrued the federal laws involved and their legislative histories; and improperly decided issues of crucial importance never argued to or decided by the District Court.

b. Appeal No. 75-1069

The Court of Appeals misread the record in ruling as it did on the procedural matters involved in this appeal. The District Court did not deny a motion under Rule 24, F.R.C.P. by the Respondents for leave to intervene in Cause No. 6639, U.S.D.C. N.M. as the Appeals Court states. The record clearly shows that the Respondents have been party plaintiffs since February, 1967 and that no such motion was ever filed by the Pueblos, or denied by the District Court. All further activity in the case from that date forward proceeded on that alignment of the parties, for the purposes of discovery, motions, etc.[8] Secondly, the Court of Appeals misread the record in stating that the United States had admitted conflict in interest in representing both the Pueblo Indians and the Government's proprietary interests in the National Forest. The record contains no such admission and the Department of Justice attorneys have

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8. A copy of the District Court's February 13, 1967 order realigning parties is attached as Appendix G to illustrate that the Pueblos had no need to seek to intervene in 1974, because they were already parties plaintiff. The fact that the "new counsel" for the Pueblos merely entered their appearance in March, 1974, rather than file a motion to intervene, demonstrates that they also recognized that the Pueblos were already parties plaintiff. The Circuit Court's confusion on this point was drawn to that Court's attention in motion for rehearing but the Circuit Court inexplicably failed to take that opportunity to correct its obvious and very prejudicial error.

consistently denied that there was any such conflict.[9] Based upon this erroneous assumption, the Court of Appeals ruled that the Indians were entitled to "intervene" and to have separate and independent representation. The Court's ruling undermined the discretionary power of the District Court to control the proceedings in its own courtroom and the holding of this court in *U. S. vs. Heckman,* 224 U. S. 413 (1912), that prohibited tribal attorneys from interfering with the legal representation of dependent Indians by the United States. Also, the Court's opinion appears to have overlooked its own case of *Pueblo of Picuris v. Abeyta,* 50 F.2d 12 (10 Cir. 1931) which held that private counsel for a Pueblo could not take control of a case in which the Department of Justice was already representing the Pueblo. The District Court's ruling was no more than an exercise of basic fairness in controlling the progress of a very complex and important multi-party case; it refused to allow the same parties (the four Pueblos) to be simultaneously

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9. As noted above, the new private counsel for the Pueblos stated on the record at the hearing on their motion for continuance (April 4, 1974) that their appearance implied no charge of inadequate representation of the Pueblos by U. S. counsel in the preceding 7 years of litigation. Indeed, the new Pueblo counsel never alleged "conflict of interest" on the part of U. S. counsel until after the District Court had ruled that all Pueblo counsel, United States and private, must act together as a team. The Commissioner of Indian Affairs asserted in an affidavit attached to Pueblo pleadings *in the Circuit Court, for the first time,* that he had determined that the new Pueblo attorneys, paid by BIA funds, should separately represent the Pueblos, because the Commissioner wished to obviate *accusations* of "conflict of interest." At no time has the Commissioner or any legal representative of the United States admitted that the Federal counsel had inadequately represented the Pueblos in this case, or were barred by conflict of interest from continuing to represent them. Indeed, Petitioners would have no objection whatever to a substitution of new, private Pueblo attorneys for old Department of Justice counsel; the problem is, however, that the new counsel have never filed to disqualify the Department of Justice counsel for Pueblos, and these Department of Justice attorneys have continued to represent the Pueblos after appearance of new Pueblo counsel, even in briefs and arguments in the Circuit Court. Petitioners are unable to understand how the Circuit Court could have assumed (erroneously) that the U. S. Department of Justice had admitted a "conflict of interest" as to representing the Pueblos when senior Justice Department counsel signed pleadings and made oral arguments for the Pueblos in that very court.

represented by two separate teams of counsel taking different legal positions, and separately examining and cross-examining witnesses, and generally creating a chaotic trial situation.

VIII. CONCLUSION.

Petitioners respectfully submit that the writ of certiorari prayed for herein should be granted for the reason that the Court of Appeals' opinion in Appeal No. 75-1106 and 75-1069 (consolidated) is contrary to law and should be set aside.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
R. LEE AAMODT, ET AL.,
Defendants-Appellees,
UNITED STATES OF AMERICA,
PUEBLO de SAN ILDEFONSO,
PUEBLO de POJOAQUE,
PUEBLO de NAMBE, and
PUEBLO de TESUQUE,
Intervenors and Appellants.

Nos. 75-1069 and 75-1106

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 6639 Civil)

Walter Kiechel, Jr., Deputy Assistant Attorney General (Wallace H. Johnson, Assistant Attorney General, Victor R. Ortega, United States Attorney, and Kathryn A. Oberly and Charles N. Estes, Attorneys, Department of Justice, on the brief) for Appellant United States.

Philip R. Ashby and William C. Schaab (John D. Donnell), Zinn & Donnell, Ashby, Rose and Sholer and Rodey, Dickason, Sloan, Akin & Robb, on the brief) for the Pueblo Appellants.

Paul L. Bloom, Special Assistant Attorney General, for Appellee State of New Mexico.

Neil C. Stillinger of Watson, Stillinger & Lunt (Sumner Buell of Montgomery, Federici, Andrews, Hannahs & Buell; Thomas B. Catron of Catron, Catron & Sawtell, G. Stanley Crout of Bigbee, Byrd, Carpenter & Crout; L. C. White of White, Koch, Kelly, & McCarthy, on the brief) for the private landowner Appellees.

James C. Thompson, filed a brief for Amicus Curiae Board of Directors El Llano Conservancy District.

L. Lamar Parrish of Ussery, Burciago & Parrish, filed a brief for Amici Curiae Pueblo of Isleta and the Pueblo of Sandia.

Before BREITENSTEIN, HILL and BARRETT, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The basic issue before us is whether water uses by Pueblo Indians in New Mexico are controlled by state water law based on the doctrine of prior appropriation. The United States District Court for the District of New Mexico made an interlocutory order that the Indian uses were controlled by state law. On the petitions of the United States and the Indians we allowed an appeal in No. 75-1106 pursuant to 28 U.S.C. Sec.1292(b) and now reverse.

In 1966 New Mexico brought suit in accordance with its water adjudication statutes, Chap. 75, Art. 4, N. Mex. Stats. Ann., 1953, for determination of rights to the use of water of the Nambe-Pojoaque River System. That system, lying entirely in New Mexico, is tributary to the Rio Grande. Substantially all of the drainage area is within the boundaries of the San Ildefonso, Pojoaque, Nambe, and Tesuque Pueblos. The United States, the four Pueblos, and about 1,000 others were named defendants. The United States, on its own behalf and on behalf

of the Pueblos, intervened to remove any immunity problem and was aligned as plaintiff. No jurisdictional question is presented. The district court referred the case to a Special Master.

The United States intervened in its proprietary capacity as owner of the Santa Fe National Forest and in its fiduciary capacity as trustee or guardian for the Pueblos. The Commissioner of Indian Affairs determined that provision of private counsel for the Pueblos was the only practical means of protecting fully the rights of the Pueblos in the face of significant conflicts of interest between the Pueblos and the United States, the far-reaching importance of the suit, and the urgency of the situation. A contract for private legal counsel was approved by the delegate of the Secretary of the Interior and funds were provided by the Bureau of Indian Affairs.

On behalf of the Pueblos the private attorneys filed a complaint in intervention. The court, on its own motion, held that the private attorneys "may not separately and independently represent the Pueblos which are already represented by government counsel", and struck the tendered complaint in intervention. No. 75-1069 is an appeal by the Pueblos from this order. The issues raised will be discussed later.

Historical background is important to an understanding of the controversy. When, in 1541-1543, the first Spanish Conquistadores invaded what is now known as New Mexico, they found numerous established Indian agricultural communities. Among those were the Pueblos with which we are concerned. The Kingdom of Spain ruled the area until 1821 when Mexico won independence. The Republic of Mexico held dominion until 1848 when, by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, it ceded the area to the United States. Articles VIII and IX of that treaty protect rights recognzied by prior sovereigns. In 1851, Congress extended the provisions of the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, to the Indians of the territory newly acquired from Mexico. See 9 Stat. 574, 587. The Act of 1834 prohibited settlement on lands belonging to Indian Tribes and provided that Indians could sell their lands only to

the United States. The Pueblos' land titles had long been recognized by the Spanish and Mexican governments. In 1858, these titles were confirmed by Congress. 11 Stat. 374.

Efforts of federal officials to protect the Pueblos' property were frustrated by the New Mexico territorial courts, which held that the Pueblos were outside the protection of federal laws. See *United States v. Lucero,* 1 N. Mex. 422, 442. The rationale of the New Mexico court was upheld by the United States Supreme Court in *United States v. Joseph,* 94 U.S. 614.

The 1910 New Mexico Enabling Act, 36 Stat. 557, 558-559, specified that the term "Indian country" includes "all lands now owned or occupied by the Pueblo Indians" and that such lands are "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in *United States v. Sandoval,* 231 U.S. 28, which specifically overruled *United States v. Joseph.* Congress then had to consider the situation created by the activities of non-Indians in acquiring and occupying land within the Pueblos after acquisition of federal sovereignty. The Pueblo Lands Act of 1924, 43 Stat. 636, created the "Pueblo Lands Board" and authorized it to investigate and determine the claims of both the Indians and non-Indians to Pueblo land. In 1933 Congress authorized payment of claims presented under the 1924 Act. 48 Stat. 108. The 1924 and 1933 Acts will be discussed in detail later.

In the arid southwestern states water scarcity presents a critical problem. *Colorado River Water Conservancy District v. United States,* ____ U.S. ____, 44 L.W. 4372, 4373(March 24, 1976). The New Mexico constitution, adopted in 1911, establishes the doctrine of prior appropriation to control the use of water. N. Mex. Const. Art. XVI, Sec. 2. One acquires a right to water by diversion and application to a beneficial use. Priority of appropriation gives the better right. Ibid. Determination of water rights is made in suit brought by the State. N. Mex. Stats. Ann., 1953, Secs. 75-4-4 through 75-4-8. The instant suit to determine rights to the use of the waters of the Nambe-Pojoaque System was brought by the State in federal district court.

New Mexico and the private parties joined as defendants assert that the rights of the Pueblos are governed by the state law of prior appropriation. The United States and the Indians say that (1) the Indians have a reserved right prior to that of all non-Indians and (2) the Indians have an aboriginal right derived from the laws of Spain and Mexico and recognized by the United States in the Treaty of Guadalupe Hidalgo. This controversy is presented in case No. 75-1106.

I

We first consider procedural problems. No. 75-1069 is an appeal from the district court's denial of the right of the Pueblos to representation by private attorneys and its rejection of the complaint in intervention filed by them on behalf of the Pueblos. The State and the private defendants-appellees moved to dismiss the appeal because the notice of appeal was not signed by counsel for the United States but by private counsel who have no standing to represent the Pueblos.

Reliance is had on *Waters v. Western Company of North America,* 10 Cir., 436 F.2d 1072, which dismissed, as improvidently granted, an appeal from an interlocutory order. The court noted that the attorney filing the petition for review was not the sole counsel of record of the petitioner. Ibid. at 1073. The court recognized the ethical problem involved. Ibid. In *Waters,* the various counsel were not in agreement. In the instant case counsel for the United States have filed a memorandum opposing the motion to dismiss. Thus harmony rather than contrariety exists among counsel for the Pueblos and counsel for the United States. The orders under attack did not operate against the United States. It had no reason to appeal or to join in an appeal.

The State also asserts that the district court's orders denying representation by private counsel and dismissing the Pueblos' complaint in intervention are not final decisions appealable under 28 U.S.C. Sec. 1291. *Fullmer v. Harper,* 10 Cir., 517 F.2d 20, 21, holds that the denial of a motion to disqualify counsel

is a final decision within the meaning of Sec. 1291. In that case a remand was ordered for the determination of facts because a serious ethical question was presented. No such complications are present in the instant case. Appealability under Sec. 1291 does not depend on the grant or denial of a motion to disqualify. The grant of the motion is just as final as the denial thereof. The order is appealable under Sec. 1291.

The denial of intervention is appealable if the applicant can intervene as a matter of right under Rule 24(a), F.R.Civ.P., or if the trial court abused its discretion in denying a permissive intervention under Rule 24(b). *Degge v. City of Boulder, Colorado,* 10 Cir., 336 F.2d 220, 221. The Pueblos claim an interest in the water which is the subject of the action and disposition may affect their ability to protect that interest. The claim that the Pueblos are adequately represented by government counsel is not impressive. Government counsel are competent and able but they concede that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos. In such a situation, adequate representation of both interests by the same counsel is impossible. The Pueblos had a right under Rule 24(a) to intervene and the denial of that right is appealable.

The motion to dismiss the appeal in No. 75-1069 is denied, and we turn to the merits of that appeal.

II.

Little more need be said about the right of the Indians to private counsel. The obligation of the United States to fulfill its fiduciary duties to the Pueblos does not diminish the rights of the Pueblos to sue on their own behalf. See *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370-371 and cases there cited. The instant case is not like *Pueblo of Picuris v. Abeyta,* 10 Cir., 50 F.2d 12 where the private counsel for a pueblo and counsel for the United States took contrary positions on the appeal of a case and the court held that the Attorney General of the United States, not the private counsel, controlled the course of the litigation. Ibid. at 14. The United States in the case at bar

recognizes and supports the right of the Pueblos to private representation.

Section 2, Title 25, U.S.C. provides:

> "The Commissioner of Indian Affairs shall, * * * have the management of all Indian affairs and of all matters arising out of Indian relations."

Acting under this broad authority, the Commissioner decided that, "private counsel independent of any possible conflict of interest should be furnished to represent the Indian interests." His action was a fair and proper exercise of his discretion and was entirely compatible with the fiduciary obligations of the United States to the Indians. The district court erred in denying the rights of the Pueblos to independent representation by private counsel.

We have noted that the intervention on behalf of the Pueblos was an intervention of right. As such, the express terms of Rule 24(a) require that the intervention be permitted. In rejecting the intervention the district court violated the rule and its order may not stand.

III.

In No. 75-1106 we granted an appeal under 28 U.S.C. Sec. 1292(b) from the interlocutory ruling of the district court that the rights of the Pueblos to the use of water of the Nambe-Pojoaque System are subject to the appropriation laws of New Mexico. A motion of the Pueblos asserts that the State of New Mexico lacks standing to participate in the appeal because it does so as parens patriae and in that capacity may not attack rights accorded to the Pueblos under Sec. 9 of the Pueblo Lands Act of 1933, 48 Stat. 108, 111. All parties find comfort in, and rely on, the 1933 Act. The State says that the Act subjects the Pueblos' rights to the State appropriation laws and the Pueblos say that it does not. The issue is for determination when the merits of the case are considered. We will not dispose of it on a procedural motion.

The Pueblos also contend that as parens patriae the State represents all of its citizens and is wrongfully asserting rights in favor of the non-Indian group against the Indian group. Both the non-Indians and the Indians are citizens of New Mexico. As parens patriae a State may not assert claims on behalf of particular citizens. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-259 n.12.

In the case at bar the State does not act as parens patriae. It brought suit in accordance with the provisions of Secs. 75-4-4 through 75-4-8, N. Mex. Stat. Ann., 1953, for determination of rights to the use of water of the Nambe-Pojoaque System. Adjudication of rights is essential to the operation of the appropriation doctrine. See *El Paso & R.I. Ry. Co. v. District Court, N. Mex.*, 8 P.2d 1064, 1069. The New Mexico Constitution provides, Art. XVI, Sec. 2, that the unappropriated water of every natural stream belongs to the public and is subject to appropriation in accordance with the laws of the State. Acting under statutory authority the State sued all persons, both Indians and non-Indians, claiming water rights. The presence of all claimants is necessary for a decree to be of any value. See *United States v. District Court of Eagle County*, 401 U.S. 520, 525. In a water adjudication suit collision between private rights and federal rights does not affect the validity of the proceedings or the right of the State to maintain the suit. Ibid. at 526; see also *Colorado River Water Conservancy District v. United States*, ____U.S.____, 44 LW 4372, 4375 (March 24, 1976). The Pueblos' motion attacking the standing of the State of New Mexico is denied.

IV.

On the merits, the Pueblos contend that their rights are not limited by the appropriation doctrine. Their first claim is that they have a reserved right to so much water as is needed for the irrigation of the irrigable land within each pueblo.

In *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690, the Court held that the Territory of New Mexico

could reject the common law riparian doctrine and adopt the appropriation doctrine. In so doing, the Court said, Ibid. at 703:

> "[T]hat in the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property."

The reserved rights of the Indians to water was first recognized in *Winters v. United States*, 207 U.S. 564. That was a suit by the United States to restrain the construction of a dam on the Milk River in Montana which prevented the water from flowing to the Fort Belknap Indian Reservation. The reservation was created by a treaty or agreement between the United States and the Indians with the approval of Congress. The reservation lands "were arid and, without irrigation, were practically valueless." Ibid. at 576. The Court said, Ibid. at 577:

> "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. (Citing cases) That the Government did reserve them we have decided, and for a use which would be necessarily continued through years."

Arizona v. California, 373 U.S. 546, was an original jurisdiction interstate suit to determine rights to the use of waters of the Colorado River. The United States on behalf of five Indian Reservations asserted rights to mainstream water. One reservation was created by Act of Congress and the other four by Executive Orders. Ibid. at 595-596. The Court rejected the Arizona contention that water rights could not be reserved by Executive Order. Ibid. at 598. The Court expressly approved the Winters decision and held that, "the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created." Ibid. at 600.

Cappaert v. United States, ____U.S.____, 44 LW 4756 (June 7, 1976), recognizes the reserved water rights doctrine and says that: "The doctrine applies to Indian reservations and other

federal enclaves, encompassing water rights in navigable and nonnavigable streams." Ibid. at 4759. The Court rejected the contention that there must be "a balancing of competing interests" and after referring to the Winters decision said: "The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation." Ibid. The Court rejected the argument that the Federal Government must perfect its implied water rights according to state law and said: "[f]ederal water rights are not dependent on state law or state procedures." Ibid. at 4760-4761.

The Pueblos did not obtain any rights by either treaty with the United States or by Executive Order. The Spanish and Mexican governments recognized the Pueblos' land titles. In the Treaty of Guadalupe Hidalgo, the United States agreed to protect rights recognized by prior sovereigns. In 1858, Congress specifically confirmed the land titles of the Pueblos with which we are concerned. 11 Stat. 374.

The 1876 Term decision in *United States v. Joseph,* 94 U.S. 614, was an action by the United States to recover a penalty under the mentioned 1834 Act for settlement on land of the Pueblo of Taos in New Mexico. The Court differentiated the Pueblo Indians from the nomadic Indians and said that the 1834 and 1851 Acts were not applicable to the Pueblos. Ibid. at 617. The Court also noted the 1858 confirmation of the Pueblo titles, Ibid. at 619, and said, "that this was a recognition of the title previously held by these people, and a disclaimer by the government of any right of present or future interference, * * *."

The Joseph decision was overturned by *United States v. Sandoval,* 231 U.S. 28. That was a prosecution for the sale of liquor in a New Mexico pueblo. The indictment was dismissed on the ground that the pertinent federal statute was invalid as applied to the Indian pueblos in New Mexico. The Court reversed and said, Ibid. at 39, that:

> "The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government."

The Court noted that the United States has treated the pueblos "as requiring special consideration and protection, like other Indian communities." Ibid.

United States v. Candelaria, 271 U.S. 432, was an action brought by the United States to quiet title to lands within a New Mexico pueblo. The district court held that the suit was barred by prior litigation to which the United States was not a party. The case reached the Supreme Court on a question certified by the Court of Appeals of the Eighth Circuit. The Court referred to the 1934 Act, 4 Stat. 730, relating to the alienation of Indian lands and the 1851 Act, 9 Stat. 587, extending the 1934 Act to " 'the Indian tribes' of New Mexico." The Court said, Ibid. at 441:

> "While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.' "

V.

The Pueblos contend that under the mentioned decisions they have a reserved right to water of the Nambe-Pojoaque System for the irrigation of the irrigable lands within the pueblos. The State of New Mexico and the non-Indian appropriators say that whatever reserved rights the Pueblos may have had were lost by the Pueblo Lands Acts of 1924 and 1933.

The decision in *United States v. Joseph* placing the Pueblos outside the protection of federal laws resulted in the acquisition and occupation by non-Indians of land within the Pueblos. The United States did nothing to protect the Pueblos. The Sandoval and Candelaria decisions overturning Joseph caused uncertainty as to the titles of both the Indians and the non-Indians. The 1924 Act, 43 Stat. 636, was enacted to quiet the title to lands

within the Pueblo Indian Land Grants. It established the "Pueblo Lands Board," and directed it to investigate, determine and report the lands within the exterior boundaries of the Pueblos, the titles to which had been extinguished in accordance with the provisions of the Act.

In the 1933 Act, Congress approved compensation for the Pueblos in excess of that recommended by the Lands Board. The Committee Report says that this was done because of an error of the Lands Board. H. Rep. No. 123, p.3, infra. Private counsel for the Pueblos vigorously supported the increase in the awards. The State argues that the increase was to pay the Pueblos for whatever reserved rights they might have had to water.

The error of the Lands Board had nothing to do with reserved rights. The error was a failure to recognize that, when the claims of non-Indians were sustained, the Pueblos lost both lands and the water rights appurtenant thereto. Litigation brought pursuant to the 1924 Act had resulted in decisions that appurtenant water went with the land. Congress increased the awards to include the value of appurtenant water.

The Committee Reports which preceded the passage of the 1933 Act support this conclusion. For practical purposes the Senate and House Reports are identical. See H. Rep. No. 123, 73rd Cong. 1st Sess. and S. Rep. No. 73 at the same session. After referring to the mentioned court decisions, the House Report reads, p.304:

> "The Indian has, accordingly, lost, under court decrees, under the doctrine of res adjudicata, certain lands with the water rights appurtenant thereto, for which loss section 6 of the act of June 7, 1924, clearly provided that he should be compensated. The present bill does no more than bring the awards up to an amount which the appraisers appointed by the Board found to be the value of this land and the water rights appurtenant thereto."

The State contends that by supporting and accepting the increased compensation the Pueblos have lost the right to claim

reserved rights to the water. Section 6 of the 1933 Act provides that the Pueblos may elect to take the authorized compensation and, if they do not so elect, any independent suit by them to determine titles must be brought within one year from the approval of the Act. Neither election by them to accept nor failure to sue amounts to waiver or estoppel. They took what their guardian offered and released nothing. Title to the lands and water remaining in the Pueblos lies in their guardian or trustee, the United States. Estoppel does not run against the United States when it acts as trustee for an Indian tribe, *United States v. Ahtanum Irrigation District*, 9 Cir., 236 F.2d 321, 334, cert. denied 352 U.S. 988, and cases there cited. No reason is asserted to take the instant case out of the general rule. The United States supports the claims of the Pueblos as against the non-Indians.

The question of the water rights of the Pueblos for use on the land which they retained was raised in the congressional hearings. Senators Bratton and Cushing of New Mexico asserted that the Pueblos were entitled to no preferential right. Congressman Leavitt of Montana stated, Hearings Before the House Committee on Indian Affairs on H.R. 9071, 72nd Cong., 1st Sess., at 122, that:

> "[W]e have got to be careful in our wording of the act of Congress that we do not extinguish an Indian right that has been long existent by a present act of Congress."

A representative of the Secretary of the Interior proposed an amendment which he characterized as recognizing for the Indians a prior right to the use of water for domestic, stockwater and irrigation purposes for lands remaining in Indian ownership. The proposal became Sec. 9 of the 1933 Act and reads:

> "Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stockwater, and irrigation purposes for the lands remaining in

> Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians."

Section 9 does not restrict the Pueblos' rights to water for use on retained land to the New Mexico appropriation laws. The provision that the Pueblos' rights are not subject to loss by nonuse or abandonment is a far cry from a submission of those rights to New Mexico law. The argument that protection against loss by abandonment is an implied recognition of New Mexico appropriation law because no protection against such loss is needed unless New Mexico law applies is unconvincing. In compliance with the Enabling Act, 36 Stat. 557, 558-559, the New Mexico Constitution, Art. XXI, Sec. 2, disclaims title to lands "owned or held by any Indian or Indian Tribes" and recognized with respect to such land "the absolute jurisdiction and control of the Congress of the United States." Any intent of Congress to relinquish its jurisdiction and control over the lands and water rights of the Pueblos must be express. It may not be implied from a tortuous construction of the language used in Sec. 9.

The State's argument that Sec. 9 was adopted as a neutral savings clause and intended to leave the question of priorities to later judicial decision is refuted by the legislative history. When the bill was before the 72d Congress, H. Rep. No. 820 thereon stated, p. 6, that:

> "The question of priority of water rights will necessarily be one for judicial determination, and this amendment is designed and intended to leave the matter to the courts for future action."

The 72d Congress did not pass the bill. The Committee reports to the following Congress omitted the quoted language and approved Sec. 9 as later adopted. The omission indicates that Congress intended Sec. 9 to have a greater effect than the submission of the controversy to the courts.

VI.

In the Winters case the reserved water right doctrine was applied to a reservation created by Congress. 207 U.S. at 577. In *Arizona v. California* that doctrine was extended to Indian reservations created by Executive Orders. 373 U.S. at 596, notes 99 and 100. Cappaert was concerned with a National Monument created by Presidential proclamation issued under the Act for the Preservation of American Antiquities, 16 U.S.C. Sec. 431.

The Pueblos received fee simple title to their lands by the 1858 Act. 11 Stat. 374. The Sandoval decision, 231 U.S. at 39, and the Candelaria decision, 271 U.S. at 440, each hold that the Pueblos are to be treated like other Indian communities. The fact that the Pueblos hold fee simple title makes no difference. Sandoval, 231 U.S. at 48.

The United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law. The recognized fee title of the Pueblos is logically inconsistent with the concept of a reserved right. By the Treaty of Guadalupe Hidalgo the United States agreed to protect rights recognized by the prior sovereigns. Whatever those rights may have been, they were validated by the 1858 Act which confirmed the land claims of the four Pueblos and which said, 11 Stat. 374, that the Commissioner of the Land Office:

> "shall cause a patent to issue therefor as in ordinary cases to private individuals: *Provided*, That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist."

A relinquishment of title by the United States differs from the creation of a reservation for the Indians. In its relinquishment the United States reserved nothing and expressly provided that its action did not affect then existing adverse rights. The mentioned decisions recognizing reserved water rights on reservations created by the United States are not technically applicable.

Under Sandoval and Candelaria, the United States has treated the Pueblos like other Indians. It is their guardian and trustee. The lands of the Pueblos may not be alienated without its consent. The rights of the non-Indians, whose claims to lands within the area confirmed in the Pueblos by the 1858 Act, were obtained because of the failure of the United States seasonably to protect the rights of the Pueblos.

Section 2 of the 1924 Act, 43 Stat. 636, provides that the Pueblo Lands Board after its investigations and determinations shall make a report and file a copy thereof with the United States District Court for the District of New Mexico. Section 3, Ibid., says that upon the filing of that report the Attorney General shall file suit in that court to quiet the Pueblos' titles to the lands for which their title has not been extinguished. In defense the non-Indians may rely on limitations of actions based on varying times of adverse possession. Section 4, Ibid. at 637. Section 5, Ibid., provides that the successful assertion of a plea of limitations shall entitle the non-Indian claimant to a decree in his favor.

VII.

The possible non-Indian claimants may be put in these classes:

1- Those who held adversely to the Pueblos before the 1858 Act.

2- Those who held lands within the Pueblos as the result of some circumstance occurring after 1858, other than the failure of the United States seasonably to protect the rights of the Pueblos.

3- Those whose rights depend on the limitation periods recognized by the 1924 Act.

As to each of these groups, the water rights of the non-Indians are not connected with, or derived from, the Indians. They had independent origin. Because of that derivation, the non-Indians are not in the position of allottees or successors to allottees.

The decision in *United States v. Winans,* 198 U.S. 371, has no bearing on the problem presented.

The rights of the non-Indians are subject to the water laws of New Mexico. The water rights of the Pueblos are not subject to the laws of New Mexico because the United States has never surrendered its jurisdiction and control. The problem remaining is the interrelationship of priorities for the water rights of the Pueblos and for the non-Indians.

Much evidence was received by the Special Master on the meaning and effect of the laws of Spain and Mexico pertinent to the Indians and to the use of water. Evidence offered by the United States on the issue was rejected. The district court did not decide what was the controlling law when the area was within the dominion of either Spain or Mexico. We decline to make such decision in the first instance.

The crucial priority date may be 1858, the date when the United States confirmed the Pueblos' titles. It is not decisive as to any non-Indian claimant in Group 1 who prior to 1858 had an adverse right to the use of any water. If such claim is made and supported the district court must make a determination of the water rights of the Pueblos under the laws of Spain and Mexico and determine the relationship between the rights of the Pueblos and of the non-Indians in Group 1. In so doing it must consider the evidence already received and in addition that offered by the United States and rejected.

The Group 2 non-Indians are in a different position. Their acquisitions did not result from any failure of the United States to perform its obligations as guardian and trustee. Whatever claims are made and supported by non-Indians in Group 2 must be determined by the district court. Without knowing what those claims are, we can make no determination of the relationship of the Group 2 non-Indians with the Pueblos.

The Group 3 non-Indians have rights based on adverse possession. We do not know whether a water right can be acquired in New Mexico by prescription. See *Pioneer Irrigating Ditch Co. v.*

Blashek, N. Mex., 64 P.2d 388, 390. Be that as it may, Sec. 9 of the 1933 Act provides that nothing contained therein "shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water."

Pursuant to the 1924 and 1933 Acts, the ownership of some lands within the Pueblos was recognized to be in non-Indians. That ownership carried with it appurtenant water. The problem is the relative priority dates of the water rights of the Pueblos and the non-Indians. Three possibilities exist. First, the Pueblos have priority over all of the non-Indians. Second, priority of all uses, both Pueblo and non-Indians, shall be determined by the first diversion and application to beneficial use. Third, the 1924 and 1933 Acts put the priorities on parity.

The answer depends on the meaning of "prior right" as used in Sec. 9. That term may not apply to a reserved right because the United States gave the Pueblos a quit claim deed to lands which were recognized by the Treaty of Guadalupe Hidalgo to be in their ownership. The United States had nothing to reserve. Sandoval says, 231 U.S. at 39, that the Pueblos "have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." Candelaria reaffirms Sandoval and says, 271 U.S. at 440, that the lands of the pueblos "like the tribal lands of other Indians owned in fee under patents from the United States are 'subject to the legislation of Congress enacted in the exercise of the Government's guardianship' over Indian tribes and their property."

When the 1924 and 1933 Acts were before Congress much discussion revolved around the reserved water doctrine approved in Winters. By using the phrase "prior rights" in Sec. 9 Congress may well have intended to recognize the Winters decision. Such an intent is consonant with both Sandoval and Candelaria. A recognition of any priority date for the Indians later than, or equal to, a priority date for a non-Indian violates the mandate of Congress that nothing in the 1933 Act shall deprive the Pueblos to a prior right to the use of water.

VIII.

One argument remains to be mentioned. The State makes much of the economic effect on the non-Indians who were awarded lands by the 1933 Act if the Pueblos have a right prior to them. In Cappaert, ____ U.S. at ____, 44 LW at 4759, the Supreme Court rejected the argument that equity calls "for a balancing of competing interests." We reach the same conclusion. The water rights of the Pueblos are prior to all non-Indians whose land ownership was recognized pursuant to the 1924 and 1933 Acts.

The quantification of the Pueblos' rights presents another problem and, in the first instance, it must be decided by the district court. Exploration of the pertinent law of Spain and Mexico may be required. We do not know. The attention of the district court is directed to the provisions of the decree in *Arizona v. California*, 376 U.S. 340, 344-345, defining the rights of the Indians.

All procedural motions in both Nos. 75-1069 and 76-1106 are overruled. In each case the orders of the district court are reversed and each is remanded for further proceedings in the light of this opinion.

BARRETT, Circuit Judge, concurring in part and dissenting in part:

I fully concur in Parts I, II, III and IV of the majority opinion.

I agree with much of the factual chronology and legal rationale set forth in Parts V, VI, VII and VIII of the majority opinion, but must respectfully dissent from some important conclusions and the ultimate disposition.

In my view the recent Supreme Court decision in *Cappaert v. United States*, ____U.S.____, (44 U.S.L.W. 4756, June 7, 1976) supports my contention that the Congress was fully cognizant of the broad scope and reach of the so-called *Winters Doctrine* following the overruling of *United States v. Joseph*, 94 U.S. 614 (1876) by *United States v. Sandoval*, 231 U.S. 28 (1913). The Congress was well aware during deliberations and hearings held prior to enactments of the Pueblo Lands Acts of 1924 and 1933 that the *Winters Doctrine* was fully applicable to all of the lands in Pueblo ownership or possession which were granted-confirmed by the United States on December 22, 1858, pursuant to 11 Stat. 374. The legislative footprints confirm that the Congress was aware that under the *Winters Doctrine* the "upstream" good faith non-Indian owners of lands and appurtenant water rights on the Nambe-Pojoaque River System would suffer the dire economic consequences so lucidly stated in *Cappaert, supra*. Recognition that *Winters Doctrine* water rights reserved by the United States for Indians are prior to all non-Indian upstream users generated Congressional enactments of the Pueblo Lands Acts of 1924 and 1933 in order to temper, at least in part, the disastrous effects of the doctrine on the "good faith" non-Indian settlers, both downstream and upstream, by effecting a *compromise*. The 1933 Act accomplished that by subjecting the Pueblos' otherwise *Winters Doctrine* water rights on the stream system *as of May 31, 1933 to the New Mexico appropriation laws*. In my view Section 9 of the 1933 Act is critical and

pivotal in "spelling out" this compromise when considered in conjunction with the legislative history of the two acts. Otherwise, much of that section is meaningless. For example, *Winters* rights cannot be lost by nonuse or abandonment unless so decreed by the Congress. The Congress did not attempt to impede the Pueblos to uses of the waters on *other* lands in their ownership to other than *Winters Doctrine* rights after May 31, 1933, in my interpretive view.

There are approximately 900 non-Indian parties involved in this suit who own lands adjacent to the Nambe System and who depend upon the waters for their economic survival. The "priority" issue which the Congress in 1933 left to the courts for ultimate disposition is now – almost 43 years later – exactly the issue which must be ultimately determined in this litigation. I suggest that unlike any other litigation heretofore presented involving Indian v. non-Indian water uses and priorities – whether under the *Winters Doctrine* or rights derived under prior sovereigns – this case does, in fact, evidence that the Congress specifically and directly did do equity and did "balance [the] competing interests" by means of enactment of the Lands Board Acts of 1924 and 1933.

Before "tracking" the language of the 1924 and 1933 Acts and the legislative history of each, some basic rules relative thereto may be helpful. Congress possesses a paramount power over the property of the Indians by reason of its exercise of guardianship over their interests. Thus, plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning and the power has always been deemed a political one not subject to the control of the judicial department of the government. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899). Congress possesses full administrative power over tribal property and if injury is occasioned to the Indians' property as a result thereof, relief must be sought solely by an appeal to the Congress, not to the courts. *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902). The propriety or justification of action by the Federal Government relative to Indian lands and the properties

is a political rather than a judicial question and that power is plenary. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974); *United States v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339 (1941), rehearing denied, 314 U.S. 716 (1942); *Sisseton and Wahpeton Bands of Sioux Indians v. United States,* 277 U.S. 424 (1928); *Buttz v. Northern Pacific Railroad,* 119 U.S. 55 (1886).

While doubtful expressions in statutes are to be resolved in favor of the Indians, still effect of legislation which proves disastrous to the Indians does not justify the courts from departing from the terms of the acts as written; the responsibility for justice or wisdom of legislation rests with Congress and the fact that its effect deals harsh consequences to the Indians cannot influence the courts, whose sole province is that of enforcing, not making the laws. *United States v. First National Bank,* 234 U.S. 245 (1914); *Choctaw Nation v. United States,* 119 U.S. 1 (1886); *Native American Church of North America v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959).

It is within the power of Congress to provide that the laws of a state shall extend over and apply to Indian country and activities thereon, where they clearly do not interfere with federal policies concerning the lands. *Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685 (1965); *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962).

Finally, for "guideline" purposes in viewing the purposes and effects of the 1924 and 1933 Acts, I deem it important to observe that federal courts must promote not only the statutory language but also the congressional intent underlying a statute. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Reference to the legislative history is of utmost importance in this case. And, in this regard, we should bear in mind that "when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'." *United States v. American Trucking Ass'ns,* 310 U.S. 534, 543-544 (1940).

The Pueblo Lands Act of 1924

The Pueblo Lands Act of June 7, 1924, 43 Stat. 636, 68th Congress, Session I, Chap. 331, S. 2932, Public. No. 253, created a three-member Board and machinery to determine title disputes within the Pueblo grants as between the Pueblo Indians and the non-Indians who occupied and held lands under claim of conveyance from the Indians.

The purpose of the 1924 Act was to make awards to the Pueblos from the United States through the Lands Board for those lands which the Board determined the Pueblos had been divested of title to non-Indian settlers due to negligence on the part of the United States government. The theory was that the United States should pay for the losses sustained by the Pueblo Indians which it might have and should have prevented. This could not include those lands, the title to which passed from Pueblo ownership to non-Indian ownership under prior sovereigns. Obviously, in such cases the United States was not at fault.

The Board was to investigate and file reports designed to determine whether the lands within each Pueblo could be recovered for the Indians by suits to be brought by the Attorney General in the nature of quiet title relative to Indian lands, the Indian title to which the report determined not to have been extinguished. Non-Indian occupants and claimants were expressly authorized to raise a special statute of limitations in defense. Section 16 of the Act provided that the Board was to separately report relative to the extent, source and character of any water right appurtenant to the lands held in possession by the non-Indian claimants; whether the lands or water rights could be or could have been at any time recovered for the Indians by action of the United States; *the fair market value of the land and water rights; and a proviso that the United States shall be liable and the Board shall award compensation to the Pueblo Tribes within the exterior boundaries of whose lands such tract or tracts of land are situate or to which water rights shall have been appurtenant to the extent of any loss suffered by the Indians thereby.*

The Act spoke clearly to the *loss* of Pueblo water rights in relation to their fair market value as appurtenant to the lands which were *not recoverable.* The Land Board determined and reported a per acre value not to exceed $35.00 to the Pueblo in relation to lands lost because of the negligence of the United States; and that the Pueblo water rights (those applicable to lands remaining in Indian ownership) were "superior" to the "secondary" rights appurtenant to lands in non-Indian ownership. While the Board did not make specific reference to the *Winters Doctrine,* it seems certain that the Board equated the Pueblos' "superior" water rights to the *Winters Doctrine.* To that extent, then, without using the term "priority" as such, the Board *did* reject the traditional rule applicable in the western states that a conveyance of land results in the conveyance of the water right appurtenant thereto. *To this extent, the Board was – in effect – later "overruled" by the Congress.* However, priority rights were not resolved.

The 1924 Act also provided that all sums of money appropriated by the Congress to any Pueblo or to any Indians were to be used for the purpose of purchasing "lands and water rights to replace those . . . lost . . . or for purchase or construction of reservoirs, irrigation works", etc., for the benefit of the lands held by the Pueblos.

The Interval Between the 1924 Act and the 1933 Act

The Pueblos complained that the $35.00 per acre awards were arbitrarily low. They pointed to certain appraisals made by the Board's own appraisers that certain of their lands were worth $100.00 per acre. Many contentions, disputes and arguments relative to the nature of the *water rights* of the Pueblos on the one hand and that of the "good faith" white settlers on the other, *in terms of priority use,* persisted and festered.

In *Pueblo de San Juan v. United States,* 47 F.2d 446 (10th Cir. 1931), cert. denied, 284 U.S. 626 (1931), this Court affirmed the decree of the United States District Court for the District of New Mexico which had confirmed an award of the

Pueblo Lands Board made under the 1924 Act wherein the Board found that of the 17,584.77 acres in the San Juan Pueblo Grant, the Indian title to 3,449.72 acres and the water rights appurtenant thereto had been extinguished; that 1,020.63 acres thereof could be recovered for the Indians by a suit seasonably brought by the United States; that $60,758.94 was the value of such lands, exclusive of improvements placed thereon; and that the loss suffered by the Indians was $29,090.53. An award in that amount was made. The Pueblos claimed that the award was insufficient and on appeal they contended: (1) that an award should have been made for all the lands and water rights as to which the Board found the Indian title to have been extinguished, and (2) that the award for the loss of lands and water rights considered was inadequate. On appeal this Court first confronted the contention that it was impossible for the Pueblos, under the laws of Spain, Mexico or the United States, to have lawfully alienated its lands and that, therefore, all of it could have been recovered by seasonable prosecution of actions by the United States. This Court stated:

> . . . Furthermore, during the time the lands were under the sovereignty of Spain, lawful conveyances could have been made by the pueblo with the approval of the sovereign; and, during the time such lands were under the sovereignty of Mexico, there is strong basis for the proposition that the pueblo had authority to convey without the approval of the sovereign.
>
> The act declares that upon review "the report of the board shall be prima facie evidence of the facts . . . .
>
> . . . [subject, however, to be rebutted] by competent evidence" . . .
>
> 47 F.2d at 447.

In relation to the Pueblo contention that the method employed by the Board in arriving at the value of the land, which it concluded could have been recovered by seasonable prosecution of a suit by the United States was erroneous, this Court held that the Pueblos had not offered any competent evidence in

opposition to the Board's finding. [47 F.2d 446 at 447.]. Further, this Court held that the "good faith" white settlers (who occupied some 3,449.72 acres) owned both the surface estate and the water rights, declared to be appurtenant to the lands. No reference was made relative to priorities. The matter was not then at issue.

Congressional Report No. 492, April 24, 1924, Senate Calendar No. 522, accompanying S. 2932, 68th Congress, after detailed historical recitation leading to the Sandoval opinion, observed in part that "Up to the time of the Sandoval case . . . it had been assumed by both the Territorial and State Courts of New Mexico, that the Pueblos had the right to alienate their property . . . as a result . . . conflicts as to title and right of possession arose . . . hearing disclosed that there are now approximately 3,000 claimants to lands within the exterior boundaries of the Pueblo grants. The non-Indian claimants with their families comprise about 12,000 persons".

Senate Report No. 678, Calendar No. 720, 72nd Congress, 1st Session, May 9, 1932, submitted by Senator Bratton from the Committee on Indian Affairs accompanying S. 2914 (enacted May 31, 1933), stated, in pertinent part:

> ". . . the object of the pending bill . . . is to compensate the Indians . . . and the non-Indians . . . for the fair market value of the lands and appurtenant water rights lost by each . . . We recommend the . . . bill . . . with larger figures of compensation to Indians and non-Indians . . . that the troublesome question of land titles and right of possession to such land and appurtenant water rights may be finally disposed of . . . the departure of the . . . Board . . . from the purpose of the Act of . . . 1924, was defended . . . *by reference to an erroneous theory that the Indians had not lost the water rights appurtenant to the lands and hence were not entitled to an award therefore. . . The Act of June 7, 1924, and the pending bill do not bear upon any question of priority of water rights between Indians and non-Indians . . . The question of priority of water rights will necessarily be one for judicial determination, and this*

> *amendment (Section 19) is designed and intended to leave the matter to the courts for future action.*" [Emphasis supplied].

Report No. 820, House of Representatives, 72nd Congress, 1st Session, March 16, 1932, was submitted by Mr. Chavez for the House Committee on Indian Affairs to accompany H.R. 9071. This report, too, states that priority of the respective water rights is to be left for judicial determination. The report relates that at that time Indian awards made by the Board had aggregated $620,904.58. Attached to the report was a memo to the Secretary of the Interior from C. J. Rhoads, then Commissioner of the Office of Indian Affairs, dated March 14, 1932, wherein he stated, *inter-alia*:

> "In the matter of water rights also a difference of treatment has occurred. In the board's findings efforts were made to preserve to the Indians in the lands that they retain priority water rights for their needs, and this factor entered into the board's findings of value of the lands and water lost to the Indians. *The reservation of a water priority was in many cases specific, was filed with the court, and should be protected.* In this bill, however, all water which, *in the opinion of the proponents of this bill, is appurtenant to the land is taken to pass with the land, and omitting as it does all reference to water priority for the remaining Indian lands, a higher valuation for the water lost is included in the . . . present-day appraisals than was used by the board. Thus the act of . . . 1924, has been interpreted one way by the board and this bill proposes to interpret it another way and to supplement or set aside the board's findings thereby making a total of $761,954.88 additional, exclusive of the amount found due the Laguna pueblo.*" [Emphasis supplied].

Report No. 123, House of Representatives, 73rd Congress, 1st Session, Report of Mr. Chavez to accompany H.R. 4014, May 10, 1933, Committee on Indian Affairs, contained these recitals of interest:

> "The Act of June 7, 1924, was passed in an effort to correct a condition which had arisen through *the loss* of

possession by said Indians of 5,545 parcels of land claimed by non-Indians who had settled upon and gained equitable or moral rights thereto, involving 98,000 acres. *Congress, by said Act of 1924, following the principles announced in the Sandoval case* . . . assumed the liability . . . to award compensation to the pueblo within whose boundaries such tracts of land are situated, *or to which water rights are appurtenant to the extent of any loss suffered by said Indians through failure of the United States seasonably to prosecute any right of the United States or of said Indians."* [Emphasis supplied].

Accompanying the above report is a letter from then Secretary of the Interior Harold L. Ickes, dated May 9, 1933, addressed to Senator Wheeler, Chairman of the Committee on Indian Affairs which reviewed the background leading to the Act of 1924. This letter includes these observations:

"The Act of June 7, 1924, was an attempt to compromise legal rights, vested in the Indians, with moral and possibly equitable rights which had become vested in non-Indians through lapse of time; and the act established the responsibility, resting upon the United States Government, to compensate Indians and whites under certain conditions defined in the Act."

"The Pueblos were to be paid compensation . . . amounting to the market value . . . of such lands where the Pueblo title was divested . . . *this compensation . . . to be expended to procure new lands and waters to replace those surrendered or taken, thus enabling the Pueblos to reestablish their economic independence."*

"The bill (Sec. 2) authorizes . . . an increase of compensation (to the several pueblos) . . . of $761,954.88 . . . the supplemental compensation . . . when added to the compensation heretofore appropriated, *is the value, less improvements, of the lands and their appurtenant waters as found by the appraisers of the . . . Board."*

"Section 9 provides, with respect to the lands now in Pueblo ownership, that the Indians prior rights to water

shall not be subject to loss through nonuse or abandonment." [Emphasis supplied].

Report No. 73, United States Senate, 73rd Congress, 1st Session, May 15, 1933, by Senator Bratton, Committee on Indian Affairs, to accompany S. 691:

Accompanying this report is a letter from then Secretary of the Department of the Interior, Mr. Ickes, dated May 9, 1933, which states in part:

"Section 6 provides for *election* by the Pueblos as to whether they will accept the amended compensation totals as in final settlement, or will reject the settlement through . . . suits . . . within one year after approval of the act . . . litigation . . . affecting the ownership of these Pueblo lands, will be forever ended."

"Section 9 provides, with respect to the lands *now* in Pueblo ownership, that the Indians prior rights to water shall not be subject to loss through nonuse or abandonment."

"Section 5 contains language designed to facilitate and safeguard the purchase . . . of lands and waters for the Pueblos through the expenditure of their compensation awards . . ."

There were many other documentaries, reports, hearings and debates. The question as to whether the non-Indians had obtained water rights with priorities on an equal measuring standard to that of the Pueblos was hotly debated. Senators Bratton and Cutting of New Mexico took a strong position, concurred in by the Pueblos (who were represented by independent counsel) that the Pueblos were not entitled to any preference over the non-Indian settlers and that all were subject to the appropriation laws of New Mexico.

One must necessarily ask at this juncture: In view of the determination by the Lands Board, acting pursuant to the 1924 Act, that no appraisals [and, of course, no awards] were to be made relative to water rights in use on lands occupied by the

"good faith" white settlers – because the Board considered them to be "secondary" to the "superior" water rights held by the Pueblos applicable to lands remaining in Pueblo ownership – what did the Pueblos *lose* justifying *additional* appropriations under the 1933 Act? There is no doubt, in my view, that the 1933 Act rejected the Board's determination made under the 1924 Act that the Pueblos had not "lost" these water rights, for which they were granted *additional compensation.* Under these circumstances, how can it be said that the Pueblos "lost" any water rights – in the all-important sense of priority – notwithstanding the additional compensation paid for the *loss* if, as the majority opinion holds, *all* Pueblo water rights now in use or which may hereafter be placed in use on Pueblo lands are not subject to the appropriation laws of New Mexico but are *Winters Doctrine* rights? If this be so, no compromise was effected and the Pueblos were compensated for the loss of water rights which are "inferior" in terms of priority to *all* water rights they retained.

It is significant that it was well recognized that at least 80 percent of the lands within the exterior boundaries of the Pueblo grants had been acquired by the white settlers (thus alienated from Indian title) in *good faith.*

The Pueblo Lands Act of 1933

The Pueblo Lands Act of May 31, 1933, 48 Stat. 108, 73rd Congress, 1st Session, Chap. 45, H.R. 4014, Public No. 28, authorized to be appropriated sums to the Indian Pueblos "for the purchase of lands and water rights to replace those which have been divested from said pueblo under the Act of June 7, 1924, or for the purchase or construction of reservoirs, irrigation works, or other pertinent improvements upon or for the benefit of the lands of said pueblos".

Sec. 2 provided:

> "In *addition* to the awards made by the Pueblo Lands Board, the following sums . . . are, authorized to be appropriated:

Sec. 9 provided:

> *"Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water, and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians."* [Emphasis supplied].

In my judgment, unlike the view of the majority, Section 9 becomes critical and pivotal in the disposition of the "priorities" dispute involved in this litigation.

The appellants argue that: (a) the 1933 Act clearly established *Winters Doctrine* water rights for the Pueblo Tribes and repudiated the contention that the Pueblo Lands Act of 1924 adopted the doctrine of prior appropriation to limit the water rights of the Indian Pueblos; (b) Section 9 of the 1933 Act established for all of the Pueblos the protection of priority to all lands remaining in Indian ownership relative to the water needed for "domestic, stock-water and irrigation purposes" not to be lost by "nonuse or abandonment . . . as long as title to said lands shall remain in the Indians"; and (c) had Congress intended that the Pueblos' rights be defined by the doctrine of prior appropriation, it would have stated that their rights were limited to lands previously or presently irrigated, subject to forfeiture with respect to lands not under irrigation.

Appellees counter, contending that the entire logic of the 1933 Act was directed to Congressional recognition of the correctness of the Pueblos' long-time contention that they were entitled to additional monetary compensation precisely because the Board, in its report submitted under the 1924 Act had erroneously relied on the *Winters Doctrine* theory in determining that the Pueblos' water rights on lands remaining in Indian ownership were "superior" to the "secondary" water rights of the white settlers. They point out that Senators Bratton and

Cutting believed, just as did representatives of the Pueblos, that the Pueblos had *lost* lands and appurtenant water rights (which Senator Bratton described as in many instances worth more than the land in this arid region) to white settlers who had dealt in good faith. Appellees contend that these white occupants whose title was ultimately affirmed, were unquestionably relegated to the New Mexico law of prior appropriation-beneficial use and that the Pueblos were, by reason of the full compensation paid for their lands and water rights *lost* (which they opted for), likewise fully subject to the appropriation law of New Mexico. Furthermore, appellees contend that the various reports and letters leading to the 1933 Act demonstrate that Section 9 was intended simply to prevent the loss through forfeiture or abandonment of the ancient water rights appurtenant to the lands remaining in Pueblo ownership, and that the entire logic of the 1933 Act was a recognition of the contention pressed by the Pueblos and their attorneys before the Congress that they were entitled to additional compensation precisely because the Board had relied on the "erroneous theory" of the applicability of the *Winters Doctrine* in its report under the 1924 Act.

Disposition

The detailed review I have made has not been undertaken for the purpose of deciding questions not raised or resolved by the District Court. *Lawn v. United States,* 355 U.S. 339 (1958). My purpose, rather, has been that of detailing facts and circumstances which I deem relevant in order to focus on the difficult issues in conflict. I must reject the District Court's broad sweeping "across the board" finding that the Pueblos are subject to the doctrine of prior appropriation and beneficial use under the laws of New Mexico. I would set the judgment aside and remand for further proceedings.

I conclude that in light of the facts and circumstances leading to the May 31, 1933 Act the Congress and the Pueblos determined that in consideration of additional appropriation of public funds the Pueblos' *Winters Doctrine* rights then *in "use"* or which *had been in use* on the reserved lands for irrigation

purposes as of May 31, 1933, were subject to the prior appropriation-beneficial use laws of New Mexico, thus placing those lands and water rights on the same footing as those of the non-Indian "good faith" settlers then owning lands and appurtenant water rights, both downstream and upstream from the Pueblo lands; subject, however, to the proviso that at no future time could the Pueblos' water rights be lost by non-use or abandonment. I am fully cognizant of the difficult problem involving the determination of priorities relative to the various uses, many of which "track" to the Spanish and/or Mexican rules. I do not construe Section 9 of the 1933 Act to subject those "new" uses – that is, Pueblo Indian uses made on lands after May 31, 1933, not previously irrigated – to the same restriction. Those uses, in my opinion, are not subject to the "compromise" above referred to. They enjoy the full benefit of the *Winters Doctrine*. Those uses are "superior" to all upstream non-Indian users based upon the Pueblos' right to apply water to those lands in an amount necessary ". . . to irrigate all the practicably irrigable acreage [not otherwise irrigated prior to May 31, 1933] on the reservations". *Arizona v. California,* 373 U.S. 546 (1963).

I would remand with instructions that the District Court conduct such further proceedings deemed necessary and to make findings of fact and conclusions of law detailing the relationship – in terms of specific lands, the appurtenant water rights, their uses and priority – on the entire Nambe-Pojoaque River System between the Pueblos and the non-Indian land owners (1) as of May 31, 1933, and (2) from and after May 31, 1933.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.,
S. E. REYNOLDS, State Engineer,
Plaintiff,

vs. No. 6639 – Civil

R. LEE AAMODT, et al.,
Defendants,

UNITED STATES OF AMERICA, et al.,
Plaintiffs-in-Intervention.

ORDER

This matter having come on to be tried on the Complaint-in-Intervention in respect to the claims on behalf of the Pueblos of San Ildefonso, Pojoaque, Nambe and Tesuque, and the Court having considered the pleadings, instruments, exhibits, memoranda and other materials on file herein, and the Court being otherwise fully advised in the premises finds that the said Pueblos owned water rights in and to the waters of the Rio Pojoaque Stream System under the laws of the Kingdom of Spain and the Republic of Mexico, and that the said rights were limited according to the history and extent of the beneficial use of such waters by the said Pueblos, and the Court concludes from this finding and from its consideration of the Constitution, Treaties and laws of the United States, and all other applicable law, that the rights of the United States of America on behalf of the said Pueblos, and the rights of the said Pueblos, in and to the waters of the Rio Pojoaque Stream System, surface and underground, are governed and limited by the doctrine of prior appropriation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the rights of the United States of America on behalf of the Pueblos of San Ildefonso, Pojoaque, Nambe and

Tesuque, and the rights of the said Pueblos, in and to the waters of the Rio Pojoaque Stream System, surface and underground, are governed and limited by the doctrine of prior appropriation, and that the United States of America and the said Pueblos shall be henceforth required in this cause to claim and prove the purpose, amount, extent and priority of all and several of their rights in the surface and underground waters of the Rio Pojoaque Stream System strictly in accordance with the history and extent of the lawful beneficial use of such waters, by and for the said Pueblos; and the Court further finds, pursuant to 28 USC Sec. 1292(b), that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this Order will materially advance the ultimate termination of the litigation.

s/ H. Vearle Payne

Hon. H. Vearle Payne
Judge of the United States
District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.
S. E. REYNOLDS, STATE ENGINEER,
Plaintiff,

vs. No. 6639 – Civil

R. LEE AAMODT, et al.,
Defendants,

UNITED STATES OF AMERICA and
PUEBLO DE SAN ILDEFONSO,
PUEBLO DE POJOAQUE,
PUEBLO DE NAMBE and
PUEBLO DE TESUQUE,
Plaintiffs-in-Intervention.

ORDER

THIS MATTER COMING on to be heard upon the Motion of the Pueblos of Tesuque, Pojoaque, Nambe and San Ildefonso, Plaintiffs-in-Intervention, for reconsideration of the Court's determination that the attorneys for the said Pueblos who entered their appearances herein on March 28, 1974, may not separately and independently represent the said Pueblos which are already represented by government counsel, and the Court having considered the said Motion and the arguments of the parties finds that that certain instrument denominated Complaint-in-Intervention filed herein by the said attorneys on behalf of the said Pueblos on the 12th day of November, 1974 should be and it is hereby stricken and removed from the file and that the said Motion for reconsideration should be and it is hereby denied.

APPROVED:

for the State of New Mexico and
Private Defendants

APPROVED:

Counsel for Plaintiffs-in-Intervention

s/ H. Vearle Payne
HON. H. VEARLE PAYNE
Judge of the United States
District Court

APPENDIX D

ACT OF JUNE 7, 1924.

CHAP. 331.–An Act To quiet the title to lands within Pueblo Indian land grants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its sovereign capacity as guardian of said Pueblo Indians shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

Sec. 2. That there shall be, and hereby is, established a board to be known as "Pueblo Lands Board" to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States. The board shall be provided with suitable quarters in the city of Santa Fe, New Mexico, and shall have power to require the presence of witnesses and the production of documents by subpoena, to employ a clerk who shall be empowered to administer oaths and take acknowledgments, shall employ such clerical assistance, interpreters, and stenographers with such compensation as the Attorney General shall deem adequate, and it shall be provided with such necessary supplies and equipment as it may require on requisitions to the Department of Justice. The compensation and allowance for travel and expenses of the member appointed by the President shall be fixed by the Attorney General.

It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated

where necessary by field notes and plats, the lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act, and the board shall not include in their report any claims of non-Indian claimants who, in the opinion of said board after investigation, hold and occupy such claims of which they have had adverse possession, in accordance with the provisions of section 4 of this Act: *Provided, however,* That the board shall be unanimous in all decisions whereby it shall be determined that the Indian title has been extinguished.

The board shall report upon each pueblo as a separate unit and upon the completion of each report one copy shall be filed with the United States District Court for the District of New Mexico, one with the Attorney General of the United States, one with the Secretary of the Interior, and one with the Board of Indian Commissioners.

Sec. 3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

Sec. 4. That all persons claiming title to, or ownership of any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action, as follows, to wit:

(a) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed, under color of title from the 6th day of January, 1902, to the date of the passage of this Act, and have

paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation, or adverse possession of the Territory or of the State of New Mexico, since the 6th day of January, 1902, to the date of the passage of this Act, except where the claimant was exempted or entitled to be exempted from such tax payment.

(b) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed with claim of ownership, but without color of title from the 16th day of March, 1889, to the date of the passage of this Act, and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation or adverse possession of the Territory or of the State of New Mexico, from the 16th day of March, 1899, to the date of the passage of this Act, except where the claimant was exempted or entitled to be exempted from such tax payment.

Nothing in this Act contained shall be construed to impair or destroy any existing right of the Pueblo Indians of New Mexico to assert and maintain unaffected by the provisions of this Act their title and right to any land by original proceedings, either in law or equity, in any court of competent jurisdiction and any such right may be asserted at any time prior to the filing of the field notes and plats as provided in section 13 hereof, and jurisdiction with respect to any such original proceedings is hereby conferred upon the United States District Court for the District of New Mexico with right of review as in other cases: *Provided, however,* That any contract entered into with any attorney or attorneys by the Pueblo Indians of New Mexico, to carry on such litigation shall be subject to and in accordance with existing laws of the United States.

Sec. 5. The plea of such limitations, sucessfully maintained, shall entitle the claimants so pleading to a decree in favor of them, their heirs, executors, successors, and assigns for the premises so claimed by them, respectively, or so much thereof as may be established, which shall have the effect of a deed of

quitclaim as against the United States and said Indians, and a decree in favor of claimants upon any other ground shall have a like effect.

The United States may plead in favor of the pueblo, or any individual Indian thereof, as the case might be, the said limitations hereinbefore defined.

Sec. 6. It shall be the further duty of the board to separately report in respect of each such pueblo–

(a) The area and character of any tract or tracts of land within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico and the extent, source, and character of any water right appurtenant thereto in possession of non-Indian claimants at the time of filing such report, which are not claimed for said Indians by any report of the board.

(b) Whether or not such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians. Seasonable prosecution is defined to mean prosecution by the United States within the same period of time as that within which suits to recover real property could have been brought under the limitation statutes of the Territory and State of New Mexico.

(c) The fair market value of said water rights and of said tract or tracts of land (exclusive of any improvements made therein or placed thereon by non-Indian claimants) whenever the board shall determine that such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians, and the amount of loss, if any, suffered by said Indians through failure of the United States seasonably to prosecute any such right.

The United States shall be liable, and the board shall award compensation, to the pueblo within the exterior boundaries of whose lands such tract or tracts of land shall be situated or to which such water rights shall have been appurtenant to the

extent of any loss suffered by said Indians through failure of the United States seasonably to prosecute any right of the United States or of said Indians, subject to review as herein provided. Such report and award shall have the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States for such losses. Such report shall be filed simultaneously with and in like manner as the reports hereinbefore provided to be made and filed in section 2 of this Act.

At any time within sixty days after the filing of said report with the United States District Court for the District of New Mexico as herein provided the United States or any pueblo or Indians concerned therein or affected thereby may, in respect of any report upon liability or of any finding of amount or award of compensation set forth in such report, petition said court for judicial review of said report, specifying the portions thereof in which review is desired. Said court shall thereupon have jurisdiction to review, and shall review, such report, finding, or award in like manner as in the case of proceedings in equity. In any such proceeding the report of the board shall be prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be rebutted by competent evidence. Any party in interest may offer evidence in support or in opposition to the findings in said report in any respect. Said court shall after hearing render its decision so soon as practicable, confirming, modifying, or rejecting said report or any part thereof. At any time within thirty days after such decision is rendered said court shall, upon petition of any party aggrieved, certify the portions of such report, review of which has been sought, together with the record in connection therewith, to the United States Circuit Court of Appeals for the Eighth Circuit, which shall have jurisdiction to consider, review, and decide all questions arising upon such report and record in like manner as in the case of appeals in equity, and its decision thereon shall be final.

Petition for review of any specific finding or award of compensation in any report shall not affect the finality of any

findings nor delay the payment of any award set forth in such report, review of which shall not have been so sought, nor in any proceeding for review in any court under the provisions of this section shall costs be awarded against any party.

Sec. 7. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior who shall report to the Congress of the United States, together with his recommendation, the fair market value of lands, improvements appurtenant thereto, and water rights of non-Indian claimants who, in person or through their predecessors in title prior to January 6, 1912, in good faith and for a valuable consideration purchased and entered upon Indian lands under a claim of right based upon a deed or document purporting to convey title to the land claimed or upon a grant, or license from the governing body of a pueblo to said land, but fail to sustain such claim under the provisions of this Act, together with a statement of the loss in money value thereby suffered by such non-Indian claimants. Any lands lying within the exterior boundaries of the pueblo of Nambe land grant, which were conveyed to any holder or occupant thereof or his predecessor or predecessors in interest by the governing authorities of said pueblo, in writing, prior to January 6, 1912, shall unless found by said board to have been obtained through fraud or deception, be recognized as constituting valid claims by said board and by said courts, and disposed of in such manner as lands the Indian title to which has been determined to have been extinguished pursuant to the provisions of this Act: *Provided,* That nothing in this section contained with reference to the said Nambe Pueblo Indians shall be construed as depriving the said Indians of the right to impeach any such deed or conveyance for fraud or to have mistakes therein corrected through a suit in behalf of said pueblo or of an individual Indian under the provisions of this Act.

Sec. 8. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior the area and the value of the lands and improvements appurtenant thereto of non-Indian claimants within or adjacent to Pueblo Indian

settlements or towns in New Mexico, title to which in such non-Indian claimants is valid and indefeasible, said report to include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians, and the Secretary of the Interior shall report to Congress the facts with his recommendations in the premises.

Sec. 9. That all lands, the title to which is determined in said suit or suits, shall, where necessary, be surveyed and mapped under the direction of the Secretary of the Interior, at the expense of the United States, but such survey shall be subject to the approval of the judge of the United States District Court for the District of New Mexico, and if approved by said judge shall be filed in said court and become a part of the decree or decrees entered in said district court.

Sec. 10. That necessary costs in all original proceedings under this Act, to be determined by the court, shall be taxed against the United States and any party aggrieved by any final judgment or decree shall have the right to a review thereof by appeal or writ of error or other process, as in other cases, but upon such appeal being taken each party shall pay his own costs.

Sec. 11. That in the sense in which used in this Act the word "purchase" shall be taken to mean the acquisition of community lands by the Indians other than by grant or donation from a sovereign.

Sec. 12. That any person claiming any interest in the premises involved but not impleaded in any such action may be made a party defendant thereto or may intervene in such action, setting up his claim in usual form.

Sec. 13. That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of

the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico, showing the lands to which the Indian title has been extinguished as in said report set out, but excluding therefrom lands claimed by or for the Indians in court proceedings then pending, and copies of said plat and field notes certified by the surveyor general of New Mexico as true and correct copies shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and interest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same. And the Secretary of the Interior within thirty days after the Indians' right to bring independent suits under this Act shall have expired, shall cause notice to be published in some newspaper or newpapers of general circulation issued, if any there be, in the county wherein lie such lands claimed by non-Indian claimants, respectively, or wherein some part of such lands are situated, otherwise in some newspaper or newspapers of general circulation published nearest to such lands, once a week for five consecutive weeks, setting forth as nearly as may be the names of such non-Indian claimants of land holdings not claimed by or for the Indians as herein provided, with a description of such several holdings, as shown by a survey of Pueblo Indian lands heretofore made under the direction of the Secretary of the Interior and commonly known as the "Joy Survey," or as may be otherwise shown or defined by authority of the Secretary of the Interior, and requiring that any person or persons claiming such described parcel or parcels of land or any part thereof, adversely to the apparent claimant or claimants so named as aforesaid, or their heirs or assigns, shall on or before the thirtieth day after the last publication of such notice, file his or their adverse claim in the United States Land Office in the land district wherein such parcel or parcels of land are situate, in the nature of a contest, stating the character and basis of such adverse claim, and notice of such contest shall be served upon the claimant or claimants named in the said notice, in the same manner as in cases of

contest of homestead entries. If no such contest is instituted as aforesaid, the Secretary of the Interior shall issue to the claimant or claimants, or their heirs or assigns, a patent or other certificate of title for the parcel or parcels of land so described in said notice; but if a contest be filed it shall proceed and be heard and decided as contests of homestead entries are heard and decided under the rules and regulations of the General Land Office pertinent thereto. Upon such contest either party may claim the benefit of the provisions of section 4 of this Act to the same extent as if he were a party to a suit to quiet title brought under the provisions of this Act, and the successful party shall receive a patent or certificate of title for the land as to which he is successful in such proceeding. Any patent or certificate of title issued under the provisions of this Act shall have the effect only of a relinquishment by the United States of America and the said Indians.

If after such notice more than one person or group of persons united in interest makes claim in such land office adverse to the claimant or claimants named in the said notice, or to any other person or group of persons who may have filed such contest, each contestant shall be required to set forth the basis and nature of his respective claim, and thereupon the said claims shall be heard and decided as upon an original contest or intervention.

And in all cases any person or persons whose right to a given parcel or parcels of land has become fixed either by the action of the said board or the said court or in such contest may apply to the Commissioner of the General Land Office for a patent or certificate of title and receive the same without cost or charge.

Sec. 14. That if any non-Indian party to any such suit shall assert against the Indian title a claim based upon a Spanish or Mexican grant, and if the court should finally find that such claim by the non-Indian is superior to that of the Indian claim, no final decree or judgment of ouster of the said Indians shall be entered or writ of possession or assistance shall be allowed against said Indians, or any of them, or against the United States of America acting in their behalf. In such case the court shall

ascertain the area and value of the land thus held by any non-Indian claimant under such superior title, excluding therefrom the area and value of lots or parcels of land the title to which has been found to be in other persons under the provisions of this Act: *Provided, however,* That any findings by the court under the provisions of this section may be reviewed on appeal or writ of error at the instance of any party aggrieved thereby, in the same manner, to the same extent, and with like effect as if such findings were a final judgment or decree. When such finding adverse to the Indian claim has become final, the Secretary of the Interior shall report to Congress the facts, including the area and value of the land so adjudged against the Indian claim, with his recommendations in the premises.

Sec. 15. That when any claimant, other than the United States for said Indians not covered by the report provided for in section 7 of this Act, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, purchase, or donation under the provisions of this Act, but has held and occupied any such parcel in good faith, claiming the same as his own, and the same has been improved, the value of the improvements upon the said parcel of land shall be found by the court and reported by the Secretary of the Interior to Congress, with his recommendations in the premises.

Sec. 16. That if any land adjudged by the court or said lands board against any claimant be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land, and the Secretary of the Interior deems it to be for the best interest of the Indians that such parcels so adjudged against the non-Indian claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash, and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian

community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

Sec. 17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

Sec. 18. That the pleading, practice, procedure, and rules of evidence shall be the same in all causes arising under this Act as in other civil causes in the Federal courts, except as otherwise herein provided.

Sec. 19. That all sums of money which may hereafter be appropriated by the Congress of the United States for the purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any pueblo or to any of the Indians of any pueblo, shall be paid over to the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians.

Approved, June 7, 1924.

APPENDIX E

ACT OF MARCH 13, 1928.

CHAP. 219.—An Act Authorizing the Secretary of the Interior to execute an agreement with the Middle Rio Grande Conservancy District providing for conservation, irrigation, drainage, and flood control for the Pueblo Indian lands in the Rio Grande Valley, New Mexico, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to enter into an agreement with the Middle Rio Grande Conservancy District, a political subdivision of the State of New Mexico, providing for conservation, irrigation, drainage, and flood control for the Pueblo Indian lands situated within the exterior boundaries of the said Middle Rio Grande Conservancy District, as provided for by plans prepared for this purpose in pursuance to an Act of February 14, 1927 (Forty-fourth Statutes at Large, page 1098). The construction cost of such conservation, irrigation, drainage, and flood-control work apportioned to the Indian lands shall not exceed $1,593,311, and said sum, or so much thereof as may be required to pay the Indians' share of the cost of the work herein provided for, shall be payable in not less than five installments without interest, which installments shall be paid annually as work progresses: *Provided,* That should at any time it appear to the said Secretary that construction work is not being carried out in accordance with plans approved by him, he shall withhold payment of any sums that may under the agreement be due the conservancy district until such work shall have been done in accordance with the said plans: *Provided further,* That in determining the share of the cost of the works to be apportioned to the Indian lands there shall be taken into consideration only the Indian acreage benefited which shall be definitely determined by said Secretary and such acreage shall include only lands feasibly susceptible of economic irrigation and cultivation, and materially benefited by this work, and in no event shall the average per acre cost for the area of Indian

lands benefited exceed $67.50: *Provided further,* That all present water rights now appurtenant to the approximately eight thousand three hundred and forty-six acres of irrigated Pueblo lands owned individually or as pueblos under the proposed plans of the district, and all water for the domestic purposes of the Indians and for their stock shall be prior and paramount to any rights of the district or of any property holder therein, which priority so defined shall be recognized and protected in the agreement between the Secretary of the Interior and the said Middle Rio Grande Conservancy District, and the water rights for the newly reclaimed lands shall be recognized as equal to those of like district lands and be protected from discrimination in the division and use of water, and such water rights, old as well as new, shall not be subject to loss by nonuse or abandonment thereof so long as title to said lands shall remain in the Indians individually or as pueblos or in the United States, and such irrigated area of approximately 8,346 acres shall not be subject by the district or otherwise to any pro rata share of the cost of future operation and maintenance or betterment work performed by the district. The share of the cost paid the district on behalf of the Indian lands under the agreement herein authorized, including any sum paid to the district from the funds authorized to be appropriated by the Act of February 14, 1927 (Forty-fourth Statutes at Large, page 1098), shall be reimbursed to the United States under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided,* That such reimbursement shall be made only from the proceeds of leases of the newly reclaimed pueblo lands whether leased by Indians or others, Indians, however, to be given the preference in the making of such leases, and the proceeds of such leases to be applied, first, to the reimbursement of the cost of the works apportioned to said irrigated area of approximately 8,346 acres: *Provided further,* That as to not to exceed 4,000 acres of such newly reclaimed lands if cultivated by Indians no rentals shall be charged the Indians: *Provided further,* That there is hereby created against the newly reclaimed lands a first lien for the amount of the cost of the works apportioned to such newly reclaimed lands which lien shall not be enforced during the

period that the title to such lands remains in the pueblo or individual Indian ownership: *Provided further,* That said Secretary of the Interior, through the Commissioner of Indian Affairs, or his duly authorized agent, shall be recognized by said district in all matters pertaining to its operation in the same ratio that the Indian lands bear to the total area of lands within the district, and that the district books and records shall be available at all times for inspection by said representative.

Approved, March 13, 1928.

APPENDIX F

ACT OF MAY 31, 1933.

[CHAPTER 45.]

AN ACT

To authorize appropriations to pay in part the liability of the United States to the Indian pueblos herein named, under the terms of the Act of June 7, 1924, and the liability of the United States to non-Indian claimants on Indian pueblo grants whose claims, extinguished under the Act of June 7, 1924, have been found by the Pueblo Lands Board to have been claims in good faith; to authorize the expenditure by the Secretary of the Interior of the sums herein authorized and of sums heretofore appropriated, in conformity with the Act of June 7, 1924, for the purchase of needed lands and water rights and the creation of other permanent economic improvements as comtemplated by said Act; to provide for the protection of the watershed within the Carson National Forest for the Pueblo de Taos Indians of New Mexico and others interested, and to authorize the Secretary of Agriculture to contract relating thereto and to amend the Act approved June 7, 1924, in certain respects.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in fulfillment of the Act of June 7, 1924 (43 Stat. 636), there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sums hereinafter set forth, in compensation to the several Indian pueblos hereinafter named, in payment of the liability of the United States to the said pueblos as declared by the Act of June 7, 1924, which appropriations shall be made in equal annual installments as hereinafter specified, and shall be deposited in the Treasury of the United States and shall be expended by the Secretary of the Interior, subject to approval of the governing authorities of each pueblo in question, at such times and in such amounts as he may deem wise and proper; for the purchase of lands and water rights to replace those which have been divested from said pueblo under the Act of June 7, 1924, or for the purchase or construction of reservoirs, irrigation works, or other permanent improvements upon or for the benefit of the lands of said pueblos.

Sec. 2. In addition to the awards made by the Pueblo Lands Board, the following sums, to be used as directed in section 1 of this Act, and in conformity with the Act of June 7, 1924, be, and hereby are, authorized to be appropriated:

Pueblo of Jemez, $1,885; pueblo of Nambe, $47,439.50; pueblo of Taos, $84,707.09; pueblo of Santa Ana, $2,908.38; pueblo of Santo Domingo, $4,256.56; pueblo of Sandia, $12,980.62; pueblo of San Felipe, $14,954.53; pueblo of Isleta, $47,751.31; pueblo of Picuris, $66,574.40; pueblo of San Ildefonso, $37,058.28; pueblo of San Juan, $153,863.04; pueblo of Santa Clara, $181,114.19; pueblo of Cochiti, $37,826.37; pueblo of Pojoaque, $68,562.61; in all $761,954.88; *Provided, however,* That the Secretary of the Interior shall report back to Congress any errors or omissions in the foregoing authorizations measured by the present fair market value of the lands involved, as heretofore determined by the appraisals of said tracts by the appraisers appointed by the Pueblo Lands Board, with evidence supporting his report and recommendations.

Sec. 3. Pursuant to the aforesaid Act of June 7, 1924, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, a sum to compensate white settlers or non-Indian claimants who have been found by the Pueblo Lands Board, created under said Act of June 7, 1924, to have occupied and claimed land in good faith but whose claim has not been sustained and whose occupation has been terminated under said Act of June 7, 1924, for the fair market value of lands, improvements appurtenant thereto, and water rights. The non-Indian claimants, or their successors, as found and reported by said Pueblo Lands Board, to be compensated out of said appropriations to be disbursed under the direction of the Secretary of the Interior in the amounts due them as appraised by the appraisers appointed by said Pueblo Land Board, as follows:

Within the pueblo of Tesuque, $1,094.64; within the pueblo of Nambe, $19,393.59; within the pueblo of Taos, $14,064.57; within the Tenorio Tract, Taos Pueblo, $43,165.26; within the

pueblo of Santa Ana (El Ranchito grant), $846.26; within the pueblo of Santo Domingo, $66; within the pueblo of Sandia, $5,354.46; within the pueblo of San Felipe, $16,424.68; within the pueblo of Isleta, $6,624.45; within the pueblo of Picuris, $11,464.73; within the pueblo of San Ildefonso, $16,209.13; within the pueblo of San Juan, $19,938.22; within the pueblo of Santa Clara, $35,350.88; within the pueblo of Cochiti, $9,653.81; within the pueblo of Pojoaque, $1,767.26; within the pueblo of Laguna, $30,668.87; in all $232,086.80: *Provided, however,* That the Secretary of the Interior shall report back to Congress any errors in the amount of award measured by the present fair market value of the lands involved and any errors in the omissions of legitimate claimants for award, with evidence supporting his report and recommendations.

Sec. 4. That for the purpose of safeguarding the interests and welfare of the tribe of Indians known as the Pueblo de Taos of New Mexico in the certain lands hereinafter described, upon which lands said Indians depend for water supply, forage for their domestic livestock, wood and timber for their personal use and as the scene of certain of their religious ceremonials, the Secretary of Agriculture may and he hereby is authorized and directed to designate and segregate said lands, which shall not thereafter be subject to entry under the land laws of the United States, and to thereafter grant to said Pueblo de Taos, upon application of the governor and council thereof, a permit to occupy said lands and use the resources thereof for the personal use and benefit of said tribe of Indians for a period of fifty years, with provision for subsequent renewals if the use and occupancy by said tribe of Indians shall continue, the provisions of the permit are met and the continued protection of the watershed is required by public interest. Such permit shall specifically provide for and safeguard all rights and equities hitherto established and enjoyed by said tribe of Indians under any contracts or agreements hitherto existing, shall authorize the free use of wood, forage, and lands for the personal or tribal needs of said Indians, shall define the conditions under which natural resources under the control of the Department of

Agriculture not needed by said Indians shall be made available for commercial use by the Indians or others, and shall establish necessary and proper safeguards for the efficient supervision and operation of the area for national forest purposes and all other purposes herein stated, the area referred to being described as follows:

Beginning at the northeast corner of the Pueblo de Taos grant, thence northeasterly along the divide between Rio Pueblo de Taos and Rio Lucero and along the divide between Rio Pueblo de Taos and Red River to a point a half mile east of Rio Pueblo de Taos; thence southwesterly on a line half mile east of Rio Pueblo de Taos and parallel thereto to the northwest corner of township 25 north, range 15 east; thence south on the west boundary of township 25 north, range 15 east, to the divide between Rio Pueblo de Taos and Rio Fernandez de Taos; thence westerly along the divide to the east boundary of the Pueblo de Taos grant; thence north to the point of beginning; containing approximately thirty thousand acres, more or less.

Sec. 5. Except as otherwise provided herein the Secretary of the Interior shall disburse and expend the amounts of money herein authorized to be appropriated, in accordance with and under the terms and conditions of the Act approved June 7, 1924: *Provided, however,* That the Secretary be authorized to cause necessary surveys and investigations to be made promptly to ascertain the lands and water rights that can be purchased out of the foregoing appropriations and earlier appropriations made for the same purpose, with full authority to disburse said funds in the purchase of said lands and water rights without being limited to the appraised values thereof as fixed by the appraisers appointed by the Pueblo Lands Board appointed under said Act of June 7, 1924, and all prior Acts limiting the Secretary of the Interior in the disbursement of said funds to the appraised value of said lands as fixed by said appraisers of said Pueblo Lands Board be, and the same are, expressly repealed: *Provided further,* That the Secretary of the Interior be, and he is hereby, authorized to disburse a portion of said funds for the purpose of securing options upon said lands and

water rights and necessary abstracts of title thereof for the necessary period required to investigate titles and which may be required before disbursement can be authorized: *Provided further,* That the Secretary of the Interior be, and he is hereby, authorized, out of the appropriations of the foregoing amounts and out of the funds heretofore appropriated for the same purpose, to purchase any available lands within the several pueblos which in his discretion it is desirable to purchase, without waiting for the issuance of final patents directed to be issued under the provisions of the Act of June 7, 1924, where the right of said pueblos to bring independent suits, under the provisions of the Act of June 7, 1924, has expired: *Provided further,* That the Secretary of the Interior shall not make any expenditures out of the pueblo funds resulting from the appropriations set forth herein, or prior appropriations for the same purpose, without first obtaining the approval of the governing authorities of the pueblo affected: *And provided further,* That the governing authorities of any pueblo may initiate matters pertaining to the purchase of lands in behalf of their respective pueblos, which matters, or contracts relative thereto, will not be binding or concluded until approved by the Secretary of the Interior.

Sec. 6. Nothing in this Act shall be construed to prevent any pueblo from prosecuting independent suits as authorized under section 4 of the Act of June 7, 1924. The Secretary of the Interior is authorized to enter into contract with the several Pueblo Indian tribes, affected by the terms of this Act, in consideration of the authorization of appropriations contained in section 2 hereof, providing for the dismissal of pending and the abandonment of contemplated original proceedings, in law or equity, by, or in behalf of said Pueblo Indian tribes, under the provisions of section 4 of the Act of June 7, 1924 (43 Stat.L 636), and the pueblo concerned may elect to accept the appropriations herein authorized, in the sums herein set forth, in full discharge of all claims to compensation under the terms of said Act, notifying the Secretary of the Interior in writing of its election so to do: *Provided,* That if said election by said pueblo be not

made, said pueblo shall have one year from the date of the approval of this Act within which to file any independent suit authorized under section 4 of the Act of June 7, 1924, at the expiration of which period the right to file such suit shall expire by limitation: *And provided further,* That no ejectment suits shall be filed against non-Indians entitled to compensation under this Act, in less than six months after the sums herein authorized are appropriated.

Sec. 7. Section 16 of the Act approved June 7, 1924, is hereby amended to read as follows:

"Sec. 16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated."

Sec. 8. The attorney or attorneys for such Indian tribe or tribes shall be paid such fee as may be agreed upon by such attorney or attorneys and such Indian tribe or tribes, but in no case shall the fee be more than 10 per centum of the sum herein authorized to be appropriated for the benefit of such tribe or tribes, and such attorney's fees shall be disbursed by the Secretary of the Interior in accordance herewith out of any funds appropriated for said Indian tribe or tribes under the provisions of the Act of June 7, 1924 (43 Stat. L. 636), or this Act: *Provided however,* That 25 per centum of the amount agreed upon as attorneys' fees shall be retained by the Secretary of the

Interior to be disbursed by him under the terms of the contract, subject to approval of the Secretary of the Interior, between said attorneys and said Indian tribes, providing for further services and expenses of said attorneys in furtherance of the objects set forth in section 19 of the Act of June 7, 1924.

Sec. 9. Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water, and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians.

Sec. 10. The sums authorized to be appropriated under the terms and provisions of section 2 of this Act shall be appropriated in three annual installments, beginning with the fiscal year 1937.

Approved, May 31, 1933.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, ex rel
S. E. REYNOLDS, STATE ENGINEER
Plaintiff,

vs. No. 6639 Civil

UNITED STATES OF AMERICA, et al.,
Defendants,

UNITED STATES OF AMERICA and
PUEBLO DE SAN ILDEFONSO,
PUEBLO DE POJOAQUE,
PUEBLO DE NAMBE and
PUEBLO DE TESUQUE,
Applicants for Intervention.

ORDER RE-ALIGNING PARTIES

This matter having been heard in open court this 13th day of February, 1967 upon motion of the United States of America and the Pueblo de San Ildefonso, Pueblo de Pojoaque, Pueblo de Nambe and Pueblo de Tesuque, and it appearing to the court that the re-aligning of these parties as parties plaintiff is useful and proper, and this having been consented to in open court by their attorney.

It is hereby

ORDERED that the United States of America and the Pueblo de San Ildefonso, Pueblo de Pojoaque, Pueblo de Nambe and Pueblo de Tesuque be re-aligned in this action as parties plaintiff, and that the Complaint in Intervention heretofore filed by said parties is hereby accepted as the Complaint of said parties, and further service or filing thereof is dispensed with.

DATED this 13th day of February, 1967.

s/ H. Vearle Payne
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-650

STATE OF NEW MEXICO, R. LEE AAMODT, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, PUEBLO DE SAN ILDEFONSO, PUEBLO DE POJOAQUE, PUEBLO DE NAMBE, PUEBLO DE TESUQUE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF INDIAN PUEBLO RESPONDENTS IN OPPOSITION

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BRIEF OF INDIAN PUEBLO RESPONDENTS IN OPPOSITION

I. INTRODUCTION

The petition for a writ of certiorari on this interlocutory appeal should be denied. The full record is not now available to the Court. If the matters presented remain in issue at the conclusion of the trial, they may be considered upon the full record. Moreover, the questions presented by the petition are insubstantial and do not warrant review at this time.

The petition raises a question concerning the identity and therefore the standing of some of the petitioners, who purport to comprise "several hundred private landowner defendants in the Court below." In fact, the great majority of the defendants have consented to judgments with the plaintiff State of New Mexico on the nature and extent of their rights. It is doubtful that those defendants have now authorized one or more of the petitioning attorneys to represent them in this interlocutory appeal, and the record does not show how many of the individual defendants are in fact represented by the petition, nor which (if any) of the signing attorneys represent them. Clearly, the attorneys for the petitioner State of New Mexico, plaintiff in the Court below, cannot represent the interests of any of the individual defendants herein.

II. STATEMENT OF PURPOSE AND BACKGROUND

The questions presented by the petition must be considered in the context of this water adjudication suit and the unique legal history of the Pueblo tribes in relation to the petitioner State of New Mexico. Petitioners state (p. 17) that the purpose of the action is "purely one to determine the nature, extent and priority of all rights of all claimants to waters of the Rio Nambe, under all applicable law." The decision of the Circuit Court is wholly consonant with that purpose. It decided that federal law controls the Pueblo's water rights, and that a specific federal law clearly assigns priority to certain of those rights. It requires the District Court to consider further evidence on the issue of priority and on all other factual questions, and thus does not foreclose (as did the District Court's prohibitive rulings) any of the important issues either

from further litigation or later appeal. The Circuit Court's decision also ensures that the Pueblos will have adequate representation by independent counsel of their separate proprietary interests as opposed to the Government's interests both as their trustee and as proprietor of other lands in the same watershed. The right to such representation affirmatively supports and is in no way inimical to the State's expressed purpose in initiating the water adjudication suit.

Since the Circuit Court's decision is inimical neither to the purpose of the petitioner State of New Mexico nor to a later appeal, its precipitate action in seeking immediate review may be difficult to understand except in the light of the unique and tragic history of the Pueblo's relations with the State. About twenty years after the assumption of U.S. sovereignty over New Mexico in 1848, the Territorial Courts preempted jurisdiction over the Pueblos and their lands. That jurisdiction was mistakenly affirmed by the U.S. Supreme Court in *U.S.* v. *Joseph*, 94 U.S. 614 (1876), which later recognized the mistake and reversed itself, on grounds that it had been misled, in the landmark decision of *U.S.* v. *Sandoval*, 231 U.S. 28 (1913). The territorial government, and later the state, maintained then, and the state continues to this day to maintain, that the Pueblos are different from other Indian tribes and do not need the same federal protections. The circumstances that the Pueblo Indians were permanently settled in villages, and that the Spanish Crown had for this reason granted them land and special protections not unlike the Federal trusteeship, were used as reasons for denying their status as Indians under Federal jurisdiction. The *Sandoval* decision held that the Pueblos were indeed Indians, that their need of

federal protection was just as great as that of all other recognized tribes, and that federal trust responsibility had been established at the inception of U.S. sovereignty.

The proof of the Pueblos' need of Federal protection is the huge loss of valuable irrigated land they suffered during the period from *Joseph* (1876) through *Sandoval* (1913). The vast majority of the "hapless non-Indian landowners" to which the petition refers (p. 10) are the successors in interest to the non-Indians who acquired (wrongfully, as it turned out) land interests within the Pueblos during this period. The legal basis of their present titles is the Pueblos Lands Act of June 7, 1924 (43 Stat. 636). This law was enacted for the express purpose of adjusting the various land claims within the Pueblos. The basic premise upon which the Act was founded was a recognition that without an act of Congress the non-Indians who had settled within the Pueblos had no valid land interest at all. The entire scheme was a clear recognition that *Joseph* was wrong, *Sandoval* was right, and that the Pueblos' land and water rights were governed by federal law, to the exclusion of state law.

The one remaining undefined resource of the Pueblos today is their water. The District Court's ruling (Exhibit A hereto) in favor of the state's doctrine of prior appropriation echoes the repudiated *Joseph* decision of 1876, and had it been allowed to stand gave promise to the State and its non-Indian allies of a similar disastrous result for the Pueblos' water rights. The Circuit Court, informed by an expertise and knowledge of Pueblo history born of its direct experience in the many cases appealed to it under the Pueblo Lands Act,

recognized that the issue of jurisdiction is fundamental to any determination of Indian rights. In seeking now a further, unnecessary and untimely appeal, petitioners betray their true objective of defining the Pueblos' water rights according to the same limitations as non-Indian rights under state law rather than "under all applicable law" as the Petition states. It is the same spurious argument that was made in *Joseph* with respect to Pueblo lands, but its success in the District Court, combined with the spoils won under *Joseph,* may help to explain the otherwise puzzling timing of the petition.

III. REASONS FOR DENYING THE WRIT

1. The Circuit Court Correctly Sustained the Right of the Indian Pueblos To Participate in the Adjudication with Private Attorneys of Their Choice.

The Circuit Court recognized that these four Indian Pueblos, which have been plaintiffs-in-intervention in the water adjudication suit since 1967, have the legal right to be represented by independent private counsel of their choice. The Petition's assertion that the District Court's denial of the Pueblos' right to participate as plaintiffs-in-intervention through independent private attorneys of their choice was "discretionary" and "an exercise of basic fairness" is a wholly false issue. The United States provided independent private attorneys to protect the proprietary rights of the Pueblos where the Government is also asserting its own proprietary rights in the watershed. The District Court had no power to deny the Pueblos the right to independent representation of their proprietary interests, as distinguished from representation by the Justice Department of the Government's interest as trustee. *U.S.* v.

Heckman, 224 U.S. 413, 446 (1912), stated that the federal courts must accept the executive branch's determination of how the separate interests of the United States and Indian tribes shall be represented in litigation:

> "In what cases the United States will undertake to represent owners of restricted lands in suits of this sort *is left, under the act of Congress, to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct, as in the Tiger case.*" [Italics added.]

Had the United States failed in this instance to provide independent representation for the Pueblos, the Justice Department would be in the position of serving as sole counsel for the potentially conflicting interests of the Department of Agriculture as proprietor of the National Forests, the Department of the Interior as trustee for the Indians, and four Indian Pueblos each of which is a separate and distinct proprietor of lands at different locations within the watershed. Although the Petition attacks (footnote, p. 19) the affidavit of the Commissioner of Indian Affairs by suggesting that the potential conflict was not a real consideration, the Commissioner stated explicitly in his affidavit that it was. A copy of the affidavit is attached as Exhibit B. Petitioners' argument that the Government itself recognized that its priority is later than the Indians' (footnote, p. 6) is equally specious; even if that recognition were binding and absolute, priority is only one of several contestable attributes of the water rights of the parties.

2. The Circuit Court Correctly Construed Applicable Acts of Congress Defining the Water Rights of Indian Pueblos.

The key statute by which Congress defined the water rights of the Indian Pueblos, is Section 9 of the Act of March 31, 1933, 48 Stat. 111:

> "Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water and irrigation purposes for lands remaining in Indian ownership, and such water rights shall not be subject to loss by non-use or abandonment thereof as long as title to said lands shall remain in the Indians."

The Circuit Court's opinion reflects its special experience with the unique and tragic history of the Pueblo Indians and Congress' intention to prevent loss of their water rights, as their lands had been lost when the protections of federal law had mistakenly been held inapplicable (see Part II above). The Court correctly interpreted Section 9 as establishing for the Pueblos a prior right to the use of water for domestic, stock-water and irrigation purposes of lands remaining in Indian ownership.

The Circuit Court thoroughly examined and considered the legislative history of the 1933 Act and the Pueblo Lands Act of 1924. It characterized the petitioners' arguments as "unconvincing" and as "implied from a tortuous construction" of the record. Respondents would be less charitable: petitioners deliberately misrepresent the legislative history of Section 9 of the 1933 Act. A notably flagrant instance is their quoting (p. 14)—in support of their interpretation of Section 9 as a "neutral savings clause"—statements from com-

mittee reports in the 72nd Congress, which were deleted from the committee reports of the 73rd Congress on the bill as passed. H. Rep. No. 123 and S. Rep. No. 73, 73rd Cong. 1st Sess. Moreover, it is clear that Congress did not repudiate the "Winters Doctrine" as an "erroneous theory." The "erroneous theory" referred to in committee reports was the Pueblo Lands Board's theory that paying the Indians $35 per acre for irrigated lands confirmed to non-Indians, rather than the $100 per acre determined by the Board's appraisers, was somehow justified as protection of their remaining rights. The colloquy between Senator Bratton, whose sentiments on Indian rights are obvious, and John Collier, who at that time was neither formal counsel for the Indians nor a government official, is lifted out of context and does not represent the view that prevailed in the final legislation.[1] The legislative history is clear and unambiguous that, as the Circuit Court held, Section 9 was added to the Act to forestall any implication that the Pueblos did not enjoy prior and paramount water rights comparable to those established under *Winters* v. *U.S.*, 207 U.S. 564 (1908), for other Indian tribes.

Petitioners' reference to the Act of March 13, 1928, 45 Stat. 312, is also misleading. That Act protected six other Pueblos—none of which is a party here—located within the boundaries of the Middle Rio Grande Conservancy District. It required the District to recognize the prior rights of the Pueblos in delivering District water for irrigation of lands already under

[1] The representations of Mr. Collier as quoted by petitioners cannot by any stretch of the imagination be construed as the "legal position [of respondents] 40 years earlier" (Petition, pp. 15-16).

cultivation and not to discriminate against the Pueblos with respect to District water supplied for new irrigation of additional Indian lands. The Act did not purport to define the water rights of the Pueblos, and its provisions regarding deliveries of District water to Indian lands by the District are entirely compatible with the definition of Pueblo water rights in Section 9 of the 1933 Act.

3. The Circuit Court Correctly Decided the Relative Priorities of the Pueblos and Private Landowners.

This interlocutory appeal was accepted by the Circuit Court to determine the legal definition of the Pueblos' water rights before presentation of extensive historical and hydrological evidence at the trial. The District Court's letter (Exhibit A hereto) by placing the Pueblos under the State's doctrine of prior appropriation, would have limited the Pueblos' proof to "their historical uses in existence at the time of the Spanish conquest" or thereafter (Petition, p. 9) and precluded introduction of evidence of the irrigation requirements for "lands remaining in Indian ownership" under Section 9 of the 1933 Act. The District Court also rejected certain evidence concerning the water rights of the Pueblos under Spanish colonial law. Since the District Court's order conflicted with the fundamental principle that the water rights of the Pueblos are defined solely by federal law and had ignored Section 9 of the 1933 Act, the Circuit Court reversal required reception at trial of the evidence offered by the Government and by the Pueblos but rejected by the District Court. It is wholly incorrect to say that the "same evidence was fully considered by the District Court" (Petition, p. 16).

The doctrine of state law erroneously imposed by the District Court, and the petitioners' "tortuous construction" of the 1933 Act in support of that doctrine, placed the issue of priority under Section 9 squarely before the Circuit Court. In considering the language of that Act, the Court held that Section 9's recognition of the Pueblos' "prior rights" necessarily made their water rights as a matter of federal law "prior to all non-Indians whose land ownership was recognized pursuant to the 1924 and 1933 Acts."

Petitioners admit that, "The prehistoric water rights priority of the Pueblos has never been disputed by the Petitioners." (Petition, p. 14). It is, therefore, unclear why petitioners complain of the Circuit Court's determination that the Pueblos' priority under federal law is senior to the rights of the non-Indians under state law. Moreover, they do not assert that they were prevented from challenging the Pueblos' priority position under federal law. They clearly could have done so but chose instead to rest on the affidavits annexed to petitioners' motion for summary judgment (Petition, p. 16, n. 6), which had been denied by the District Court in August 1973 (Petition, p. 8).

4. The Petition Is Untimely and Unwarranted.

Petitioners do not assert that the Circuit Court's determination of the relative priorities under the 1933 Act is incorrect. Since the Circuit Court remanded for trial on a full presentation of evidence, priorities that may be determined by Spanish or Mexican law (for rights arising before 1858) will be fully litigated. This Court obviously cannot make any final disposition of the priority issues on this interlocutory appeal before those later proceedings have been completed.

The decision below is not in conflict with that of any other court of appeals, the petition presents no substantial federal question, and review of an interlocutory decision is both untimely and unwarranted. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 7, 1976

APPENDIX

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
ALBUQUERQUE, NEW MEXICO 87103

H. VEARLE PAYNE, *Chief Judge*

September 17, 1974

TO ALL COUNSEL OF RECORD AND THE SPECIAL MASTER:

RE: STATE v. AAMODT
No. 6639 Civil

Gentlemen:

It is the Court's understanding that the trial in this matter before the Special Master was tentatively scheduled to resume on September 23, 1974. Therefore, it is imperative that the Court address itself to certain matters which have developed in this case prior to any resumption of the trial.

On June 10, 1974, a Motion for Pretrial Order and Proposed Pretrial Order was filed. A response in opposition by the State of New Mexico and certain private defendants was filed on June 17, 1974. Apparently the Special Master conducted a hearing on this matter on June 20, 1974. On July 5, 1974, the Special Master addressed a letter to all counsel of record which was subsequently filed as of record on July 22, 1974. Therein the Special Master states that the "pretrial order dated ....., 1969, is the pretrial order controlling this case" and further that he is rejecting the motion for pretrial order filed June 10, 1974, "except as to the inclusion of the additional witnesses . . . ", As a result of that letter the State of New Mexico and some private defendants filed their exceptions and objections to the Special Master's decision stated in the July 5, letter. (It is interesting to note that *two* responses to the exceptions and objections of the state and private defendants were filed. One response was filed on August 12, 1974, and signed by the Assistant U. S. Attorney of Albu-

querque and the Department of Justice attorney. Then two days later, on August 14, 1974, the "response of Indian plaintiffs to exceptions and objections of the State of New Mexico and non-Indian defendants" was filed and signed by the three "new" attorneys. This question of the position of the three private attorneys will be discussed later in this letter.) Subsequently, the Court held a hearing on August 15, 1974, concerning the exceptions and objections of the State and the private defendants to the ruling of the Special Master in his July 5, letter. At that hearing several questions surfaced concerning confusion which evidently had been brewing ever since the Court's letter of August 28, 1973. Currently the Court feels it must rule on two very basic but nonetheless extremely important questions of which the Court became aware at the August 15, hearing. The Court called for briefs of these questions and has been in receipt of these briefs concerning the respective positions in this matter. It seems the Court must determine:

1. Whether the Court should now enter an interlocutory order determining as a matter of law that the water rights of the Indian Pueblos are to be determined by the doctrine of prior appropriations, and consequently, if such an order is allowed, how should the record be completed for purposes of an interlocutory appeal? (It would seem the primary question on the completion of the record would concern whether or not the Court should allow testimony by the proposed additional witnesses not listed in the 1969 pretrial order.)

2. What the "new" attorneys' position is in this litigation?

The Court will address itself to the former question first.

The Court wrote a letter concerning this case on August 28, 1973. It seems there has been some differences of opin-

ion about the meaning of that letter. The Court regrets if it was not explicit enough in that letter. Hopefully what follows will clarify the apparent confusion.

By means of a letter the Court wrote on July 6, 1973, and the aforementioned August 28, letter, the Court thought that it had ruled that the prior appropriations doctrine should be the principle upon which the water rights were to be adjudicated. Evidently, the attorneys cannot agree on what the Court desires.

In the letter of July 6, 1973, the Court did state that the questions were "of such importance that they should not be decided by summary judgment and that the matter should be left open for all parties". The import of that statement and the August 28, letter was that the Court was going to sustain the Special Master's ruling as to the summary judgment question in order that all evidence as to *all* legal theories (whether those legal theories be the prior appropriations doctrine, the Winter's Doctrine, or some other type of preferential water rights theory) could be tendered. It was reasoned by the Court that, by permitting all offers of proof, on whatever theories, the record would contain the position of both sides so the Appellate Court would have before it a complete and comprehensive record upon which to decide whether the prior appropriations doctrine or some other theory applied as to the determination of the Pueblos' water rights. However, it was the further intention of the Court by the July 6 and August 28 letters, to make it clear to all parties and the Special Master that the Court was going to *ultimately* decide the question only on evidence relevant to the prior appropriations doctrine.

In the third paragraph of the letter of August 28, the Court states "My only purpose in writing this letter is for the guidance of the Special Master and attorneys." Near the end of that same letter the Court states "I realize that those matters are not really before me at this time

but I am merely stating my view so that the Special Master may be guided by what I have said."

At that time the Court was attempting to state that the Special Master was correct in his rulings as to the motion for summary judgment. It appeared at that time that if summary judgment was granted, even offers of proof as to the other legal theories would be inappropriate. Therefore, the Court reasoned that the Motion for Summary Judgment should be denied, that all evidence should be in the record and that an offer of proof could be made as to evidence on other than the prior appropriations doctrine for purposes of completing the record. However, the Court further reasoned that the case would be decided finally on the prior appropriations theory. The Court, though, at that time, did not anticipate additional witnesses other than those listed in the 1969 pretrial order.

At this moment the Court would like to state that it has nothing but the highest respect for the handling of this case by the Special Master and the Court takes all blame as to any confusion which it may have caused by its reasoning in the July 6 and August 28 letters.

Now, turning to the direct question of interlocutory appeal. It should be noted from the outset that there is a general Federal policy against interlocutory or "piecemeal" appeals. *See Switzerland Cheese Ass'n. Inc., vs. E. Horne's Market, Inc.,* 384 U.S. 23 (1966). However, the Court is of the opinion that an immediate appeal concerning the legal theory upon which the water rights of the Pueblos is to be determined would materially advance the ultimate termination of this litigation. The Court has considered the entire matter and reasons that the case should be brought to an end at the earliest possible date. It would further appear to the Court that this "earliest possible date" would be much facilitated if the case was now brought to an appealable posture on the question of which legal theory to apply. Accordingly, it appears to the Court

that the matter should be "whipped into shape" so that it can be taken up to the Circuit on an interlocutory appeal.

The next problem is how best to prepare the record in order to facilitate the appeal. Herein is posed the question of whether or not to allow the additional witnesses, listed in the proposed pretrial order of June 10, 1974, to testify.

The Court stated in its letter of April 26, 1974, which was concerned with granting the extension of six months in which to begin the trial as requested by the "new" attorneys, "the Court did not intend to interfere with procedural matters". The Court is aware that what is now before it concerning the additional witnesses could be labeled a procedural matter. However, the Court must now, with all due respect to the Special Master, concern itself with this procedural matter.

During the hearing on August 15, 1974, the State took the position that if the additional witnesses were allowed to testify, there would be the matter of deposing the witnesses, probably seeking other witnesses to oppose them and that, all in all, it would possibly take another two years before the case would be ripe for final adjudication.

Some lawyers who represented private parties stated they had been waiting a long time for an adjudication of their rights and that they should be adjudicated promptly. Their position was that a postponement of justice might be a denial of justice. It is the Court's position that the Government and the Pueblos', as previously mentioned in this letter, should be allowed to make an offer of proof so that the entire matter would be before the Circuit. However, the Court does not feel that the offer of proof should be done by taking the testimony of any witnesses except those which were named in the original pretrial order. To rule otherwise would mean that the original pretrial order was not binding on the parties, and of more importance,

that undue delay would result. The Court is aware of *Sill Corporation v. U. S.*, 343 F.2d 411 (1965), and *Case* v. *Abrams,* 352 F.2d 193 (1965), the two decisions cited by counsel for the State and the private defendants, as well as other authority. The Court interprets this authority to infer that the instant case is not a proper case in which to allow the amendment of the original pretrial order to include the additional witnesses.

The trial judge is vested with broad discretion in considering when a pretrial order should be amended. See *Bettes* v. *Stonewall Ins. Co.,* 480 F.2d 92 (1973). Also, *see Monod* v. *Futura, Inc.,* 415 F.2d 1170 (10th Cir. 1969). Further, it is stated in Rule 16 of the Federal Rules of Civil Procedure that "such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice". The Court finds much comfort in this statement: "A Court should be liberal in allowing amendments where a failure to amend might result in grave injustice, whereas the allowance of an amendment will cause no substantial injury to the opposing party and the inconvenience to the Court will be slight." 62 Am.Jur. 2d, Pretrial Conference, Section 37.

It appears to the Court that no grave injustice will result by denying the amendments sought in this case. The Government and the State and the private litigants have (or if not should be allowed to) present all evidence on their opposing legal theories concerning prior appropriations, the Winter's Doctrine or some other preferential right theory *as listed in the original pretrial order.* It does seem that to allow the amendment of the pretrial order would cause substantial injury or at least be highly prejudicial to the position taken by the State and private defendants unless, of course, the Court allowed the additional time, possibly two years or thereabouts, for the State and private defendants to prepare rebuttal to the proposed additional witnesses. Such occurrence would be more than

a slight inconvenience to the Court as well as all concerned. The Court is aware that the proposed new witnesses Dobkins and Taylor, the new material prepared by the old witness Ellis, as well as the other "new" witnesses listed in the proposed amended pretrial order may have very important and revealing information on the question of whether the Pueblos had a type of preferential water right. However, if the time was allowed possibly the State and private defendants advocating prior appropriations might come up with just as persuasive authority for their position which would rebut the above mentioned witnesses. It simply does not seem fair and possibly even an instance of "manifest injustice" to allow an offer of proof by the Government by new witnesses to go up on appeal which the opposing counsel has not been provided the opportunity to adequately rebut. Furthermore, and possibly of the most importance, the Court reasons that there is ample record on all positions based on the evidence listed in the original pretrial order for the Circuit to consider. In effect, the Court does not want a changing of the witnesses in the "middle of the stream" for all the reasons stated. Therefore, the Court is, with all due respect to the Special Master, ruling that the original pretrial order must stand as to the original witnesses and that any additional witnesses may not be used for any purpose. There may be a question of substituted witnesses. For example, Dr. Gorman for Dr. Burkette would seem acceptable. However, as to the "expert in Spanish Law-History" or "other" suitable replacement, it seems at this late date that opposing counsel have not deposed these additional witnesses and do not know what they would testify to nor do they have ample opportunity to oppose and rebut the testimony. Further, it appears Dr. Jose Fuentes Mares was the expert on Spanish Law-History and that he testified for the Government on these matters. However, it will be for the Special Master to rule on the particulars of whether a certain witness is a "new" witness or merely a substitute, etc. The

Court has ruled and believes that, this time, its ruling is clear. The 1969 pretrial order is to control all matters in this case and no new witnesses are to be allowed. The Special Master and counsel can work out the details of what should be in the transcript of the record.

The Court acknowlwedges receipt of the letter from Mr. Bloom dated September 11, 1974. The Court does not feel and must presume that the counsel who submitted the material on September 9, 1974, did not intend to influence the Court ex parte. Regardless, the Court did not consider any of the affidavits or reports attached to the "brief of the United States and Indian plaintiffs". As for the additional arguments on what is the appropriate legal theory to apply, the Court has already stated its position that prior appropriations is the correct doctrine. Both sides will have more than ample opportunity to argue the point to the Circuit Court.

There seems to be some question on how this matter should be appealed. That is, whether it should be done via 28 USC 1292(b) or Rule 54(b) of the Federal Rules of Civil Procedure. Couldn't the attorneys, in conjunction with the Special Master, at least determine and agree which would be the most appropriate vehicle and similarly agree on an order? The Court reasons that 1292(b) seems to be the more correct method. We are not concerned with a "final" judgment of a "claim" but rather we are concerned more with a "controlling question of law". In fact the claims cannot be finally adjudicated until the Court determines which legal theory to apply. Counsel for the State propose an instruction to the Special Master concerning holding in abeyance any further proceedings and the submission to the Court by the Special Master of a transcript of the record. Couldn't this likewise be adequately handled in a 1292(b) order? Therefore, on the presumption that all evidence as listed in the original pretrial order has been presented as concerns the correct legal

theory to apply, the Court requests that the necessary order, or orders, and other necessary material be prepared by all counsel in cooperation with the Special Master. Of course, this presumes that the record is complete at this stage. However, as aforementioned it is for the Special Master to rule on the particulars on whether all pertinent witnesses as of the original pretrial order have testified and whether the record is complete for purposes of the appeal as concerns the correct legal theory in this case.

The second question which came before the Court at the August 15, 1974, hearing was the position of "new" attorneys.

The Court is aware of *Heckman* v. *United States,* 224 U.S. 413 (1912), which is cited in both briefs currently before the Court. Also, the Court considered the Tenth Circuit opinion of *Pueblo of Picuris* v. *Abeyta,* 50 F.2d 12 (1931).

The Court feels that any attorney may represent the tribes *if* the tribes take some position contrary to that which has been taken by their attorneys in the past. However, the tribes have not filed a complaint in intervention and, in fact, it is difficult to understand how the Pueblos could intervene again in a case which they have been the plaintiff-intervenors since 1967. Further, the Pueblos have not filed any pleadings to take issue with the position of the Government attorneys. Under the circumstances of this case, it is simply not correct procedure for the additional counsel to, in effect, separately and independently represent the tribe which are already represented by Government counsel whether that separate and independent representation be in briefs, during cross-examination of witnesses, etc. For example, in any hearing the "new" attorneys should not be permitted to cross-examine a witness if a witness has already been cross-examined by the Government. Also, as noted in this letter at page one, two *separate* briefs were filed in response to the State and pri-

vate defendants exceptions and objections to the Special Master's July 5, letter, one brief by the "new" attorneys and one brief by the Government attorneys. This is not to say that the new counsel cannot participate as co-counsel. However, in terms of the vernacular the Court used at the August 15, 1974, hearing, which is very apropos to the situation under the pleading as they stand in this case, the Pueblos cannot have "two bites out of the apple". Therefore, when the Circuit Court has ruled on this question of whether the prior appropriation doctrine or some other doctrine should be applied, we can then go ahead and wind up the case. However, this ruling concerning the new and Government attorneys will remain the same unless the Circuit Court rules to the contrary.

This letter presumes that the September 23, resumption of trial is vacated unless the Special Master determines that the record is not complete as concerns all applicable evidence as listed in the 1969 pretrial order. The Special Master may, on that day, prefer to meet with counsel concerning how best to draft the orders, etc., necessary for this matter to go up on appeal, however, these matters are for the Special Master's consideration.

The Court hopes this letter clears up some of the apparent confusion which has arisen in the past. Also, the Court will appreciate prompt attention to the necessary preparations for the appeal.

Sincerely,

/s/ H. VEARLE PAYNE
H. Vearle Payne

EXHIBIT B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 1069

STATE OF NEW MEXICO, *Co-Respondent,*

v.

R. LEE AAMODT, ET AL., *Co-Respondents*

PUEBLO DE SAN ILDEFONSO
PUEBLO DE POJOAQUE
PUEBLO DE NAMBE
PUEBLO DE TESUQUE
Petitioners

Affidavit

Morris Thompson, being first duly sworn, deposes and says:

1. I am presently Commissioner of Indian Affairs of the United States Department of the Interior. I was appointed to this post by the President, confirmed by the United States Senate on December 3, 1973, and have served continuously since that date.

2. I have been informed that the Pueblos of Tesuque, Pojoaque, Nambe, and San Ildefonso are taking an appeal to the Tenth Circuit Court of Appeals from the Order of the District Court in *State of New Mexico* v. *Aamodt,* No. 6639—Civil (D. N.M.) entered on December 6, 1974, denying the private attorneys for such Pueblos the right to represent them separately and independently from the attorneys for the United States and striking *sua sponte* a Complaint-in-Intervention filed by such Pueblos on November 12, 1974. I am giving this affidavit because I believe that these decisions interfere with important actions by the Bureau of Indian Affairs in fulfillment of the trust

obligations of the United States to protect its Indian wards and their property, including water rights.

3. The issues raised by the *Aamodt* case concerning the water rights of the four Indian Pueblos have long been of concern to officials at the highest levels of the Department of the Interior. We believe that the ultimate decision by the courts in this case will have far-reaching consequences as a judicial precedent, affecting the other 15 New Mexico Pueblos and perhaps Indian tribes in other states.

4. Conflicts of interest often arise between the trust obligations of the United States and the programs and policies of various federal agencies. On the one hand, the United States has a strict fiduciary obligation to protect and preserve Indian rights to natural resources, including rights to land, water, minerals, timber and to hunt and fish. On the other hand, certain federal agencies are charged by statute with administering programs that conflict with Indian claims to these same natural resources. In this *Aamodt* case, for example, the United States Forest Service has assembled a claim to water in the same watershed involved in the litigation. Allegations have also been made that other federal agencies would profit from restricting the water rights claims of these four Pueblos. Irrespective of the ultimate validity of these allegations, I believe it is important for the United States to avoid even the appearance of a conflict of interest in a case of such far-reaching significance.

5. For the above reasons, the Bureau of Indian Affairs has in this instance, as in other similar cases, decided that private counsel independent of any possible conflict of interest should be furnished to represent the Indian interests. The Bureau's Albuquerque Area Director approved a special attorney contract on March 28, 1974, pursuant to which the three attorneys could be funded to represent the Pueblos in the *Aamodt* litigation.

6. The Bureau of Indian Affairs has provided all funds for the services, disbursements, and expenses of these attorneys. It was contemplated that the private attorneys would cooperate with, but would be independent from, the Government's attorneys in the Department of Justice. Those were deliberate actions to fulfill the Government's trust obligations to the Pueblos.

7. The Order entered by the District Court on December 6, 1974, defeats the intention and actions of the Bureau of Indian Affairs—that Government's trust responsibilities to the Pueblos in this case shall be discharged by providing private counsel of the Indians' choice to work in cooperation with, but independently from, the attorneys of the Department of Justice.

8. The decisions described above on behalf of the United States as trustee were made in the sound discretion of the Bureau of Indian Affairs under the legal mandate of Congress and the Courts to function as a trustee for the protection of Indian rights and property. They are, in my opinion, essential to the implementation of the trust obligations of the United States in this *Aamodt* case.

/s/ Morris Thompson
Morris Thompson
Commissioner of
Indian Affairs

No. 76-650

In the Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF NEW MEXICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 537 F. 2d 1102. The pertinent orders of the district court (Pet. Apps. B and C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1976, and a timely petition for rehearing was denied on August 11, 1976. The petition for a writ of certiorari was filed on November 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the water rights of the Pueblo Indians of New Mexico are limited by the doctrine of prior appropriation, or whether the Pueblos are instead entitled to water rights sufficient to meet their present and

future needs under the principles of *Winters* v. *United States*, 207 U.S. 564, and *Arizona* v. *California*, 373 U.S. 546.

2. Whether, in enacting the Pueblo Lands Acts of June 7, 1924 (43 Stat. 636), and May 31, 1933 (48 Stat. 108), Congress preserved the priority of the Pueblo Indians' water rights over any rights acquired by non-Indians under those Acts, and confirmed the inapplicability of the prior appropriation doctrine to the water rights of the Pueblo Indians.

3. Whether the Pueblo Indians may be represented by independent private counsel in addition to the representation provided by the Department of Justice, when the Bureau of Indian Affairs has determined that such supplemental representation is in the best interests of the United States and the Pueblo Indians.

STATUTES INVOLVED

Pertinent provisions of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, and of May 31, 1933, 48 Stat. 108, are set forth in the appendix to the petition at pp. D37 to D47 and F51 to F57.

STATEMENT

This case concerns the water rights of the Pueblo Indians of New Mexico. The merits were heard by the court of appeals as an interlocutory appeal under 28 U.S.C. 1292(b). The action was instituted by the State of New Mexico in 1966 in the United States District Court for the District of New Mexico as a general adjudication of the water rights of claimants to the Nambe-Pojoaque-Tesuque stream system, a small tributary of the Rio Grande in north-central New Mexico. The numerous defendants (more than 1,000) named in this suit are landowners along the stream who claim rights to use water (Pet. App. A2).

Among the defendants originally named by the State in its complaint were four Indian pueblos within the watershed:

Nambe, San Ildefonso, Pojoaque and Tesuque.[1] The United States was also named as a defendant, both because of its ownership of the Santa Fe National Forest, where these streams originate,[2] and because of its fiduciary responsibilities in regard to the four pueblos. To avoid any issue of sovereign immunity, the United States and the four pueblos filed a motion to intervene and were realigned as plaintiffs-in-intervention (Pet. App. A2-A3, G58).

After several years of trial preparation and discovery the State of New Mexico and certain of the private defendants moved for partial summary judgment, seeking a ruling that the water rights of the four pueblos were governed by the doctrine of prior appropriation rather than the reserved rights doctrine established by this Court in *Winters* v. *United States*, 207 U.S. 564; and *Arizona* v. *California*, 373 U.S. 546. The district court initially denied the State's motion, on the ground that the case involved a matter of importance to the public which should not be decided on summary judgment. At the same time, however, the district court indicated that, after trial, it intended to enter a ruling limiting the Pueblo Indians' water rights in strict accordance with the doctrine of prior appropriation (Br. of Pueblo Resp. in Opp., App. 3a[3]).

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[1]The term "pueblo" refers to various separate communities of the Pueblo Indians. Some pueblos include reservations withdrawn from the public domain by statute or executive order; all are centered around lands to which the communities held fee title under grants of the Spanish, Mexican, and United States governments and which the Pueblo Indians occupied originally. See Cohen, *Handbook of Federal Indian Law* 383-384, 395 (1942). However established, pueblos constitute "Indian country" and the Pueblo Indians living there are wards of the United States. *United States* v. *Chavez*, 290 U.S. 357; *United States* v. *Sandoval*, 231 U.S. 28; *United States* v. *Candelaria*, 271 U.S. 432.

[2]This aspect of the United States' interest in the case was not involved in the interlocutory appeal (Pet. 5-6).

[3]Hereinafter cited as "Pueblo App."

After two trial segments before a Special Master, the United States and the four pueblos jointly moved to amend the pretrial order, which had been adopted in 1969, to designate certain additional and substitute witnesses and permit them to present newly-discovered evidence at a final trial segment (Pet. 6-7).[4]

The Special Master before whom trial proceedings had been held approved this amendment, but the district court ruled that the 1969 pretrial order would control and that no new witnesses, documents or other exhibits would be permitted (Pueblo App. 1a-4a). Thereafter, the district court entered an interlocutory order holding that the water rights of the Pueblo Indians "are governed and limited by the doctrine of prior appropriation" (Pet. App. B). The district court also entered an order (Pet. App. C) barring participation in the case by independent private counsel who had been retained by the four pueblos to supplement representation by the Department of Justice.[5] The district court certified the former order for interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. B), and the pueblos appealed the latter as a final order under 28 U.S.C. 1291. The court of appeals reversed both orders (Pet. App. A).

As to the challenge of the United States and the four pueblos to determination of Pueblo Indians' water rights by the prior appropriation doctrine, the court of appeals held

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[4]Several of these witnesses would have presented additional evidence concerning the nature of pueblo water rights under Spanish law (Record on Appeal, Vol. I, pp. 179G-179K, 194A-194N).

[5]The Bureau of Indian Affairs provided the funds for this representation, following a decision by the Commissioner of Indian Affairs that the Pueblo Indians should be provided with independent private counsel to avoid any appearance of a conflict of interest on the part of the United States in such important litigation. As noted, the United States appeared in the case to assert its proprietary interests in the Santa Fe National Forest as well as to represent the Pueblo Indians as its wards (Pueblo App. 11a-13a).

that the Pueblo Indians, like other Indian tribes, are entitled to have their water rights determined under federal law as set forth in *Winters* v. *United States*, 207 U.S. 564, and *Arizona* v. *California*, 373 U.S. 546. The court further rejected petitioners' contention that in enacting the Pueblo Lands Act of May 31, 1933, 48 Stat. 108, Congress had intended to subject the Pueblo Indians to the prior appropriation doctrine. The court of appeals concluded that the Pueblo Indians were entitled to reserved water rights with a priority date of at least 1858, the year in which Congress expressly confirmed their land titles derived from the King of Spain (Act of December 22, 1858, 11 Stat. 374). At trial, the United States and the pueblos had also urged that the Pueblo Indians enjoyed superior water rights under Spanish and Mexican law, and hence that the Pueblo Indians' reserved water rights have a priority dating back to the beginning of Spanish colonization in 1598, when such rights were first recognized by the Spanish Crown. Addressing the refusal to consider evidence not bearing on the prior appropriation doctrine, the court of appeals directed the district court to consider "the evidence already received and in addition that offered by the United States and rejected" (Pet. App. A17). The court also remanded the case for quantification of the Pueblo Indians' water rights, referring the district court to the provisions of this Court's decree in *Arizona* v. *California*, 376 U.S. 340, 344-345, "defining the rights of the Indians" (Pet. App. A19).

In the pueblos' separate appeal on the representation issue, the court of appeals held that in the circumstances they were entitled to independent representation by private counsel (Pet. App. A7).

ARGUMENT

1. The basic issue in this case is whether the water rights of the Pueblo Indians should be limited by the doctrine of prior appropriation, or whether instead their rights should be

governed by the principles decreed by this Court in determining the water rights of other Indian tribes in *Winters* v. *United States*, 207 U.S. 564, and *Arizona* v. *California*, 373 U.S. 546.

New Mexico water law, like that of most western States, is based on the doctrine of prior appropriation. Under that doctrine, water rights are established and maintained solely by actual beneficial use of water, and priority of use gives the higher right. Thus, under New Mexico law, the water rights of competing parties are determined solely with reference to their past water uses (Pet. App. A4).

However, this Court has held that local doctrines of prior appropriation are inapplicable to the water rights of the United States in the performance of its sovereign responsibilities (*United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 703). This includes its duties as guardian for its Indian wards such as the Pueblo Indians (see n. 1, *supra*, p. 3). In *Winters, supra*, the Court held that the Indians of the Ft. Belknap Reservation in Montana were entitled to water from a river bordering their reservation in amounts sufficient for the irrigation of their irrigable lands—without regard to their past use of water. The Court noted that the lands of the reservation "were arid and, without irrigation, were practically valueless," and held that the waters necessary to sustain the Indians on their reservation were "exempt * * * from appropriation under the state laws." 207 U.S. at 576-577. Water uses of non-Indians initiated after the reservation was established were thus subject to the Indians' superior rights.

The Court reaffirmed this principle more recently in *Arizona* v. *California, supra*. There, the Court determined that the five Indian reservations of the lower Colorado River, one created by Act of Congress and four by Executive Order, were entitled to sufficient water to irrigate all their "practicably irrigable" land, with priorities as of the dat the reservations were created. 373 U.S. at 600.

As the court of appeals recognized, these principles are fully applicable to the instant case because there is no reasonable basis for distinguishing the Pueblo Indians of New Mexico, as wards of the United States, from the Indian tribes involved in the Court's previous decisions (see n. 1, *supra*, p. 3). Ever since the United States acceded to sovereignty over the area that is now New Mexico, Congress and the Executive have regarded the Pueblos as Indian tribes properly subject to the exclusive jurisdiction and control of the United States, under Congress' power "[t]o regulate commerce * * * with the Indian tribes." United States Constitution, Article I, Section 8, clause 3. In 1851, Congress extended the provisions of the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, to the Indian tribes of the territory newly acquired from Mexico. Act of February 27, 1851, 9 Stat. 574, 587. The Act of 1834 had prohibited settlement on lands belonging to Indian tribes and provided that the Indians could sell their lands only with the approval of the United States.

Land titles of the Pueblo Indians had long been recognized by the Spanish and Mexican governments.[6] In 1858, the titles of certain Indian pueblos, including the four involved in this case, were confirmed by Congress (Act of December 22, 1858, 11 Stat. 374). However, when the officials of the Indian Department attempted to protect the Pueblo Indians' property by asserting federal laws against trespass on Indian lands, their efforts were frustrated by the territorial courts. These courts held that the Pueblo Indians were outside the protection of federal laws restricting alienation because they were "people living in fenced abodes and cultivating the soil," as opposed to "wild, wandering savages." *United States* v. *Lucero*, 1 N.M. 422, 442. This Court upheld that rationale in *United States* v. *Joseph*, 94 U.S. 614. Thus, the Pueblo Indians, a simple agricultural

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[6]See Cohen, *supra*, n. 1, at 383-384.

people, suffered the disadvantages to which unsophisticated Indians historically have been subject in dealing with acquisitive non-Indians: risk of loss of their holdings by improvident sale or by adverse possession. As a consequence, the Pueblos lost much of their best land during this period.[7]

This process was reversed just before the admission of New Mexico to statehood in 1912. In the New Mexico Enabling Act, 36 Stat. 557, 558, 559 (1910), Congress specified that the term "Indian country" should include "all lands now owned or occupied by the Pueblo Indians," and that such lands should be "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in *United States* v. *Sandoval,* 231 U.S. 28, a prosecution for the introduction of liquor into one of the pueblos. It was argued that Congress had no power to include Pueblo Indian lands within "Indian Country" and thus no power to bar the introduction of liquor therein. The Court held, however, that (231 U.S. at 47):

> [B]y an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and * * * this assertion of guardianship over them cannot be said to be arbitrary, but must be regarded as both authorized and controlling.

[7]Cohen, *supra,* n. 1, at 387-388.

The Court, in substance, overruled its earlier opinion in *Joseph,*[8] and decisively affirmed the government's power to protect the Pueblos from the application of state law.

In *United States* v. *Candelaria,* 271 U.S. 432, 441-442, the Court expressly held that the Pueblos had been among the Indian tribes protected by the 1851 Act,[9] and thus had never been capable of alienating their land:

> While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, "any tribe of Indians." Although sedentary, industrious and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico. A more reasonable view is that the term "Indian tribe" was used in the acts of 1834 and 1851 in the sense of "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya* v. *United States,* 180 U.S. 261, 266. In that sense the term easily includes Pueblo Indians.

[8]The Court stated that its *Joseph* opinion had been "based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available, and with the long-continued action of the legislative and executive departments," and therefore was not controlling. 231 U.S. at 48-49.

[9]Act of February 27, 1851, 9 Stat. 574.

To the same effect is *United States* v. *Chavez*, 290 U.S. 357, recognizing federal jurisdiction to try non-Indians for crimes within a pueblo against Pueblo Indians.

Petitioners' arguments cannot be reconciled with the clear mandate of Congress and this Court that the differences between the Pueblos and other Indian tribes do not justify denying the Pueblos the full benefits of federal protection. Part of that protection is the rule, firmly established by this Court, that Indian tribes whose land the federal government has undertaken to protect are entitled to water rights sufficient to make that protection meaningful. *Winters* v. *United States, supra; Arizona* v. *California, supra.* This principle applies whether the land was a reservation from the public domain, or as is true for the Pueblo Indians, was a historic holding which the United States undertook to guarantee. Thus, the court of appeals correctly held that "[t]he fact that the Pueblos hold fee simple title [to their lands] makes no difference" (Pet. App. A15). Instead the important fact is that "[t]he United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law." *Ibid.* Federal protection would be entirely frustrated unless sufficient water to irrigate the Pueblos' irrigable lands is held "exempt * * * from appropriation under the state laws."[10] Consequently, after the United States assumed responsibility for the Pueblo Indians, no one could, without the express statutory consent of the United States, acquire a right to water superior to the Indians' right to a sufficient supply to meet their needs for

[10] *Winters* v. *United States, supra*, 207 U.S. at 577; cf. *Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800, 805; see also *Cappaert* v. *United States*, 426 U.S. 128.

irrigation and other reasonable uses.[11] *Winters* v. *United States, supra; United States* v. *Rio Grande Dam and Irrigation Co., supra.* Cf. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162. This result is clearly compelled by this Court's prior decisions in *Sandoval, Candelaria* and *Chavez*, and does not warrant further review.[12]

2. Because petitioners contended that Congress expressly terminated whatever reserved rights the Pueblo Indians might have once enjoyed, the court of appeals also discussed at some length the effect on their water rights of the Pueblo Lands Acts of June 7, 1924 (43 Stat. 636), and May 31, 1933 (48 Stat. 108). In the Pueblo Lands Act of 1924, Congress established an administrative tribunal, the Pueblo Lands Board, to settle the confusion of titles which had resulted from the nineteenth century rulings of the territorial courts (*supra*, pp. 7-8) that the Pueblos were not

[11] The court of appeals suggested that 1858 may be the critical date—the year Congress enacted legislation confirming the Pueblos' land titles. Pet. App. A17. The United States believes that the correct date is at least 1848, when the United States acceded to sovereignty over the area by the Treaty of Guadalupe Hidalgo, 9 Stat. 922. Although the 10-year difference is not of major significance in this particular case, there are other Pueblo Indians whose land titles were not confirmed by Congress until the 1890's. In any future litigation concerning the water rights of those Indians, the government would urge acceptance of 1848 as the controlling date.

In addition, the United States will attempt to establish on remand of this case that the Pueblo Indians were also entitled to reserved rights to irrigate their lands under Spanish and Mexican law. This would establish a priority date for the Pueblos' reserved rights of 1598.

[12] Petitioners disavow (Pet. 17) any claim "that Pueblo Indian water rights derive from the Constitution and laws of the State of New Mexico * * *." Since there is no federal doctrine of prior appropriation, however, the district court would necessarily have to derive the substantive principles of the doctrine from local—New Mexico—law. Petitioners thus seek indirectly to apply to the Pueblo Indians a state law doctrine that they concede cannot be applied directly.

within the protection of federal law. After passage of the New Mexico Enabling Act in 1910 and the *Sandoval* decision in 1913, Congress had to deal with the fact that many non-Indians had acquired or were occupying land within the boundaries of the Indian pueblos and were now clearly in trespass.

The Pueblo Lands Act of 1924 was an exercise of the United States' "sovereign capacity as guardian of said Pueblo Indians." 43 Stat. 636. It provided that non-Indians who had held land within the pueblos for specified periods of time could be confirmed in their titles. The Indians were to be compensated by the United States for the value of the lands thereby lost and "any water right appurtenant thereto." The Pueblo Lands Board was established to determine which non-Indians were qualified to retain their land under the Act and what compensation was owed to each pueblo by the United States.

The work of the Lands Board was extensively reviewed at congressional hearings during 1930 to 1932 and a supplementary Pueblo Lands Act was passed in 1933, 48 Stat. 108. Section 2 of this Act increased the compensation awards to fourteen enumerated pueblos above those adopted by the Board. Because the nature and relative priority of the Pueblos' water rights had been the subject of extensive discussion, both in the reports of the Lands Board and later before the congressional committees, the 1933 Act included the following proviso (Section 9, 48 Stat. 111):

> Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians.

This provision firmly established the intent of Congress that the non-Indians awarded lands under the 1924 Act would not take water rights with a priority equal to that retained by the Indians (Pet. App. A17-A18). Its express language makes clear Congress' intention that its action in adjusting the compensation for the enumerated Pueblos was not in derogation of the Pueblos' rights under the *Winters* doctrine.

The court of appeals correctly rejected petitioners' contention that Congress increased the Pueblos' awards as compensation for the surrender of superior water rights under the *Winters* doctrine. The legislative history conclusively refutes this construction. Section 9 as finally enacted was proposed to the House Committee on Indian Affairs by Mr. Northcutt Ely, a representative of the Secretary of the Interior. He explained to the Committee (Hearings on H.R. 9071 (Authorization of Appropriations to Pay in Part the Liability of the United States to Certain Pueblos) before the House Committee on Indian Affairs, 72d Cong., 1st Sess., 123 (1932):

> Unquestionably, under the awards of this board and the decrees of the court, the Indian has lost certain lands. The question arises as to what water rights he has lost, if any, because of being divested of title to that land. The Pueblo Lands Board has said that he lost only a right to the excess water over and above what he needed upon the land he retained. In other words, he lost a secondary water right and retained a prior and paramount right as to the land he retained.

Congressman Leavitt of Montana then inquired (*id.* at 125):

> How is the difference of opinion on that question of prior and secondary water rights going to be ultimately settled?

Mr. Ely replied (*ibid.*):

> I think it can be settled by incorporating as an amendment to any bill which may come out of here a specific reservation of the priority of the Indians.

Mr. Ely then proposed (*id.* at 127) the precise language which was enacted by Congress as Section 9, recognizing for the Indians "a prior right to the use of water * * * for domestic, stock-water and irrigation purposes for lands remaining in Indian ownership * * * ."[13] Thus, the court of appeals correctly held that those non-Indians whose entitlement to lands within the boundaries of the pueblos stems from the Pueblo Lands Acts are entitled only to such water rights as Congress decreed, namely, water rights secondary to the "prior rights" retained by the Indians.[14]

3. Finally, the United States joins the four pueblos in urging that the court of appeals properly directed the district court to permit participation in this case by their

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[13]The court of appeals properly gave only passing mention to the remarks of Senators Bratton and Cutting of New Mexico, relied on so extensively by petitioners (Pet. 11-14). As the court observed, these Senators "asserted that the Pueblos were entitled to no preferential right." Pet. App. A13. Yet their views were not accepted by Congress as a whole, which instead adopted the plain language of Section 9.

[14]Petitioners contend that under the decision below the Indians in effect received additional compensation for their water rights though they surrendered nothing. The legislative history cited shows, however, that the Pueblo Indians were being compensated because the Board undervalued both their land and the appurtenant water rights. To the extent that the Indians gave up irrigable lands, they necessarily suffered a reduction of their water rights, since those rights extend to all of the Pueblos' practicably irrigable land. *Arizona* v. *California*, *supra*, 373 U.S. at 600. Thus when irrigable lands were confirmed to non-Indians under the 1924 Act, the Indians necessarily lost the right to claim, *pro tanto*, appurtenant water rights.

independent counsel as well as by government counsel. There are distinct roles in this proceeding for government counsel, representing the United States both as guardian and as owner in its own right of significant property within the watershed, and for private counsel, responsible only for safeguarding the interests of the Pueblo Indians. The Bureau of Indian Affairs has determined that it is in the best interests of the United States and the Pueblos for the Pueblos to have independent representation in addition to that provided by the Department of Justice (Pueblo App. 11a-13a). That determination should be respected by the courts. Cf. *Heckman* v. *United States*, 224 U.S. 413, 446; *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365. On remand, the district court is obviously free to make reasonable provision to avoid duplication in the introduction of evidence and the examination of witnesses; thus, there is no reason to review the decision of the court of appeals on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1976

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF FLATHEAD, MISSION, AND JOCKO VALLEY IRRIGATION DISTRICTS FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN RESPONSE TO PETITION NO. 650.

AND

BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF FLATHEAD, MISSION, AND JOCKO VALLEY IRRIGATION DISTRICTS FOR LEAVE TO FILE AS AMICUS CURIAE

Pursuant to Rule 42 of the Supreme Court of the United States, the Flathead, Mission, and Jocko Valley Irrigation Districts ("the Districts") move this Court for leave to file the accompanying brief in this case as *amici curiae.*

The Districts are non-profit Montana corporations whose members are owners of lands within the exterior boundaries of the Flathead Indian Reservation in Montana. Accordingly, the individual Indian and non-Indian members of the Districts all trace their land titles with appurtenant water rights to the Confederated Salish and Kootenai Tribes of the Flathead

Indian Reservations ("the Tribes"); that is to say, they trace their title to the Tribes through the United States acting as trustee for the Indians pursuant to the Act of April 23, 1904, 33 Stat. 302, and amendments thereto, whereby certain Flathead Indian Reservation lands were required to be alloted to members of the Tribes and other such lands were opened to settlement and other disposition to non-Indians. Under the doctrine announced by this Court in *Winters* v. *United States,* 207 U.S. 564 (1908), upon creation of the Flathead Indian Reservation, Congress, which had the power to do so, by implication reserved appurtenant water rights necessary for irrigation. *United States* v. *McIntire,* 101 F.2d 650 (9th Cir. 1939). As successors-in-interest to some of these lands, the landowners comprising the Districts acquired appurtenant *Winters* doctrine water rights with a priority equal to the *Winters* rights appurtenant to lands allotted to individual Indians or retained by the Tribes. *United States* v. *Powers,* 305 U.S. 527 (1939), *aff'g* 94 F.2d 783 (9th Cir. 1938), *aff'g as modified,* 16 F. Supp. 155 (D. Mont. 1936).

The United States Court of Appeals for the Tenth Circuit below held that Congress intended that the Indians of the Pueblos also should have water rights. However, the Court of Appeals failed to recognize that such water rights, created by implication whenever the United States set aside or confirmed to Indians arid Western lands where water for irrigation was essential, *inhere in and run with the benefited lands,* so that when portions thereof are transferred to individual Indians or to non-Indians, proportionate *Winters* doctrine rights go with the land. This is the essential teaching of this Court's holding in *United States* v.

Powers, supra. The Court of Appeals accordingly erred in holding that Indian landowners in the Pueblos have appurtenant water rights superior in priority to the water rights of non-Indian landowners within the Pueblos who, pursuant to acts of Congress, acquired title to Pueblos lands with appurtenant water rights. In reaching this erroneous conclusion with respect to the relative priorities of Indians and non-Indians to water, the Court of Appeals neither discussed nor cited, and apparently did not even consider, the holding of this Court in *United States* v. *Powers, supra.* The error of the Court of Appeals on the important question of priorities as between Indians and non-Indians who claim rights as successors-in-interest to lands having appurtenant water rights is in conflict with the principle of the *Powers* case pursuant to which the members of the Districts claim their proportionate *Winters* doctrine water rights.

Neither the Court of Appeals nor any of the petitioners has alluded to the theory or the holding of this Court's controlling decision in *United States* v. *Powers, supra.* Accordingly, this motion should be granted to permit *amici curiae* to present a matter of controlling significance which is not being presented by the parties.

Respectfully submitted,

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December 9, 1976

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF FLATHEAD, MISSION, AND JOCKO VALLEY IRRIGATION DISTRICTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

I. INTEREST OF THE AMICI CURIAE

The Flathead Irrigation District, the Mission Irrigation District, and the Jocko Valley Irrigation District ("the Districts") are non-profit Montana corpor-

ations whose members are owners of lands within the exterior boundaries of the Flathead Indian Reservation in Montana. Accordingly, the individual Indian and non-Indian members of the Districts all trace their land titles with appurtenant water rights to the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservations ("the Tribes"); that is to say, they trace their titles to the Tribes through the United States acting as trustee for the Indians pursuant to the Act of April 23, 1904, 33 Stat. 302, and amendments thereto, whereby certain Flathead Indian Reservation lands were required to be allotted to members of the Tribes and other such lands were opened to settlement and other disposition to non-Indians. Under the doctrine announced by this Court in *Winters* v. *United States,* 207 U.S. 564 (1908), upon creation the Flathead Indian Reservation, Congress, which had the power to do so, by implication reserved water rights necessary for irrigation. *United States* v. *McIntire,* 101 F.2d 650 (9th Cir. 1939). As successors-in-interest to some of these lands, the landowners comprising the Districts acquired appurtenant *Winters* doctrine water rights with a priority equal to the *Winters* rights appurtenant to lands allotted to individual Indians or retained by the Tribes. *United States* v. *Powers,* 305 U.S. 527 (1939), *aff'g* 94 F.2d 783 (9th Cir. 1938), *aff'g as modified,* 16 F. Supp. 155 (D. Mont. 1936).

The United States Court of Appeals for the Tenth Circuit held the the Congress intended that Indians of the Pueblos also should have water rights. However, the Court of Appeals failed to recognize that such water rights, created by implication whenever the United States set aside or confirmed to Indians arid Western lands where water for irrigation was essen-

tial, *inhere in and run with the benefited lands,* so that when portions thereof are transferred to individual Indians or to non-Indians, proportionate *Winters* doctrine rights go with the land. This is the essential teaching of this Court's holding in *United States* v. *Powers, supra.* The Court of Appeals accordingly erred in holding that Indian landowners in the Pueblos have appurtenant water rights superior in priority to the water rights of non-Indian landowners within the Pueblos who, pursuant to acts of Congress, acquired title to Pueblo lands with appurtenant water rights. In reaching this erroneous conclusion with respect to the relative priorities of Indians and non-Indians to water, neither the majority of the Court of Appeals nor the dissenting judge discussed or cited, or apparently even considered, the holding of this Court in *United States* v. *Powers, supra.* The error of the Court of Appeals on the important matter of priorities as between Indians and non-Indians who claim rights as successors-in-interest to lands having appurtenant water rights is in conflict with the principle of the *Powers* case pursuant to which the members of the Districts claim their proportionate *Winters* doctrine water rights.

II. REASONS FOR GRANTING THE WRIT OF CERTIORARI

The holding of the Court of Appeals respecting the relative priority of Indian and non-Indian owners to water rights, when non-Indians claim title as successors-in-interest to Indians having *Winters* doctrine or similar rights, is squarely contrary to the holding of this Court in *United States* v. *Powers, supra.* The writ should therefore be granted pursuant to Rule 19(b) of this Court.

In the *Powers* case the United States brought suit on behalf of an irrigation project serving Indians on an Indian reservation against certain successors-in-title to Indian reservation lands who were diverting water upstream from the Indian irrigation project. The defendants who included Indian allottees, non-Indian grantees of Indian allottees, and other non-Indians who acquired title from the United States acting as trustee for deceased Indians were held to have succeeded to *Winters* doctrine water rights appurtenant to their lands. Relief was denied on the ground that the defendants' water rights, being derived from the same source, were equal to the Indians' water rights.

In the instant case, the Court of Appeals recognized that the non-Indian landowners in question obtained title pursuant to statutes of the United States and that they also obtained appurtenant water rights. It is evident that the lands in question were lands within Pueblos to which Indian water rights had attached under the holding of *United States* v. *Winters, supra.* Under the holding of the *Powers* case, therefore, the non-Indian landowners must be held to have rights equal in priority to water rights appurtenant to lands retained by the Indians.

In addition, the Court of Appeals below so far departed from the acceptable and usual course of judicial proceedings as to warrant exercise of this Court's supervisory power. *See* Rule 19(b) of this Court.

In the instant case, Chief Judge Payne of the United States District Court for the District of New Mexico issued an interlocutory order, holding that the Pueblos' water rights were governed and delimited by the doctrine of prior appropriation which is generally applic-

able within the State of New Mexico. (A copy of Chief Judge Payne's order, dated December 2, 1974, is attached as Appendix B to the Petition for Writ of Certiorari.) Chief Judge Payne certified this interlocutory order as a controlling question of law pursuant to section 1292(b) of title 28 of the *United States Code*, and thereby permitted an interlocutory appeal. Chief Judge Payne's order did not deal with the question of the relative priorities of Indians and non-Indians, nor did the order deal with the nature or derivation of the non-Indians' water rights. On the contrary, the only question presented by the interlocutory appeal from Chief Judge Payne's order was the soundness of his holding that the Indians' water rights were subject to the doctrine of prior appropriation.

Because of the narrow question that Chief Judge Payne's order presented, the issue of relative priorities between Indians and non-Indians was neither argued nor briefed before the Court of Appeals. Nevertheless, that Court reached the issue. After deciding that Chief Judge Payne had erred in holding that the general doctrine of prior appropriation was applicable, and determining that the Indians enjoyed *Winters* doctrine or similar water rights, the Court of Appeals went beyond the narrow question presented, and, without benefit of argument or citation to controlling authorities, held that the water rights of the Pueblos will in all circumstances be prior to those of non-Indians who acquired title to Pueblo lands from the United States pursuant to an act of Congress.

The Court of Appeals does not anywhere cite the decision of this Court in *United States* v. *Powers,*

supra. Nor does the Court of Appeals in any way allude to the theory of that case, that is to say, that non-Indians successors-in-interest to Indians or to Indian Tribes obtained from their Indian predecessors the same water rights that such predecessors had, with equal priority.

WHEREFORE, it is respectfully requested that this Court grant the petition for Certiorari and vacate the order of the Court of Appeals insofar as it purports to determine priorities as between Indian and non-Indian owners of Pueblo lands.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 9th day of December, 1976, copies of the Motion for Leave to File a Brief Amici Curiae and said Brief were mailed, in accordance with Rule 33 of the Supreme Court of the United States, to all parties required to be served.

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